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WINTER, 1942

THE EMERGENCY PRICE CONTROL ACT

SPRING, 1942

GOVERNMENTAL TORT LIABILITY

SUMMER, 1942

LABOR IN WARTIME

AUTUMN, 1942

THE CORRECTION OF YOUTHFUL OFFENDERS

CORRECTION:

In the article by E. D. Ford, Jr., *Latin American Taxes Affecting Inter-American Trade* (Autumn, 1941) 8 LAW AND CONTEMPORARY PROBLEMS 776, *the fourth sentence in the paragraph on p. 789, entitled* "ADVANTAGES OF DIFFERENT METHODS OF DOING BUSINESS," *should read as follows:*

On the other hand, a locally incorporated subsidiary or agent need only pay local taxes and the parent company need only pay United States income taxes on the interest or dividend received, ordinarily with credit for such taxes thereon paid abroad.

LAW AND CONTEMPORARY PROBLEMS

VOLUME IX WINTER, 1942 NUMBER 1

FOREWORD

Among the sacrifices which war exacts is the impairment of those deliberative processes in government which are designed to stay the immediacy or the finality of executive action in order that the individual citizen may be heard and his interests duly considered. Where, as in this country, such processes have become embedded in the democratic tradition, they do not yield easily to wartime exigencies. Nevertheless, already we have seen wide and important areas of action withdrawn from the customary law-ways of the nation. It is all the more significant, therefore, that in the critical field of price control we still find the rule-making power subject to administrative and judicial review and the enforcement power channeled through the state and federal courts.

Perhaps this conservatism flows from a recognition of the market as the nerve center of even a wartime economy; perhaps, from a belief that price controls, more readily than others, can be operated through basically familiar mechanisms. Whatever the explanation, the fact remains that in few segments of the war administration has more room been left for legal representation of the private interest. Accordingly, the problems of price control today are not solely economic and administrative: they are legal problems as well, and he who would understand the operation of price control must achieve an understanding of its legal bases in the Emergency Price Control Act of 1942.

It was in recognition of this need that so many of the officials of the Office of Price Administration consented to add to their pressing daily responsibilities the burden of developing for this symposium their personal views concerning the provisions of the Act and the questions, legal and economic, which confront its administrators. Their analyses cannot pretend to full objectivity and definitiveness; the law has emerged too recently from the fire of controversy, and experience under it is still too limited. But the views of those who have been living a year and more with the problems of price control are of immediate importance and will not lose their pertinence with even so considerable change in policy as would be involved in the adoption, under the Act, of an over-all price ceiling.

The symposium opens with a prefatory note in the characteristic vein of the Price Administrator, cutting beneath questions of policy and procedure to fundamental considerations of public spirit. This note is succeeded by an article which places price control in its economic context and considers broadly the methods complementary to direct price control which may be utilized to combat inflation.

The succeeding five articles focus on the Emergency Price Control Act. The first of these deals with the provisions of the Act which confer authority upon the Price Administrator and prescribe sanctions for his orders. The second is devoted to a description and defense of the special procedures for the protest and judicial review of price orders, procedures which constitute an ingenious endeavor to adjust familiar forms to emergency uses. The constitutionality of the substantive powers conferred by the Act is the subject of the third article in this group. In the fourth article discussion is centered upon the economic considerations which must be weighed in the formulation of commodity price orders. The last of the articles on the Act is directed to the power to establish maximum rents and the economic occasion for its exercise.

Price control largely eliminates price as an automatic rationing agency and hence renders imperative the development of devices to assure the distribution of scarce goods equitably and to essential civilian uses. The devices developed—priorities, allocations, and rationing—their legal bases, the evolving procedures for their administration, and the consonance of these procedures with the requirements of due process, all are considered in an article by the Deputy Director of Civilian Supply.

The necessity for government interference in the workings of the market has not been accompanied by a withdrawal of the statutory prohibition against private interference, but the changing situation has necessitated adjustments which are described in an article discussing the role of the Sherman Act in the price emergency.

The concluding article surveys the price control experience of Great Britain, an experience more significant to us than that of the totalitarian nations since, like ours, Britain's controls must operate within the framework of a democratic state.

The symposium includes no articles dealing in detail with controls over wages, profits, and credit or with wartime taxation. Although, as is pointed out in some of the articles noted above, important interrelationships exist between these factors and direct price control, it was felt that their intensive treatment would require far more space than would be available in this symposium. Moreover, national wage policy and its legal implementation will be considered in the Summer, 1942, issue, and very possibly in subsequent issues other controls can be dealt with.

To the subscribers to this quarterly a word of explanation, if not apology, is due. This symposium, originally scheduled for Autumn publication and, as the Winter number, emerging tardily in the Spring, has been delayed in order that adequate treatment of the long-deferred Price Control Act might be provided. When the material which delay in publication has made available is duly weighed, the old saw may be revised to read: Better late than early.

DAVID F. CAVERS.

A PREFACE TO PRICE CONTROL

LEON HENDERSON*

To be quite frank I am no longer worried too much about the economics or the law of price control. I am satisfied that, as a matter of economic analysis, we understand the job to be done. I am also confident that the legal framework under which we operate protects the Constitutional rights of the American citizen. I have read some of the manuscripts which have been prepared for this symposium. They reflect, in part at least, the care with which the problems of law and economics have been considered. I know this to be true, in a far more intimate way, from my working association with the economists and lawyers of the Office of Price Administration.

Inevitably, as a result of the effort to meet first things first, there are other aspects of our assignment about which the same cannot be said. One such—which I do not intend to discuss—is the vast and intricate administrative task which price control involves. Here the contour lines are not so well drawn. Nor have we fully charted that equally important area which has to do with gaining understanding and acceptance of price control by businessmen and the general public.

This latter problem is particularly acute because price restrictions will be a new, widespread and painful experience. Such economic control is not a familiar function of government in the United States and many a real or fancied victim in his personal anguish will be tempted to forget the national necessity from which it arises. I need not argue with the readers of this volume the necessity for price regulation to the effective prosecution of the war and the protection of the civilian population. The public, too, understands this and is broadly sympathetic. But tolerance when the restraint strikes home is sometimes another matter. When prices are fixed, if they are fixed effectively, some individuals or groups lose the full return which they might otherwise have extracted. There is no ducking this fact.

Therefore, while price control now enjoys an amorphous general approval, our real problem is to crystallize public recognition of its necessity and to solidify support for its objectives. Much still remains to be done along these lines. Personally I have

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little sympathy for high pressure information or propaganda campaign partly because I wouldn't know how to run one and partly because the American people have a healthy suspicion of too grandiose efforts to enlighten them. A stable public opinion cannot be built on ballyhoo. The price control agency does, however, have a responsibility to the public as well as to itself to explain its efforts in protecting against the disastrous consequences of inflation and more particularly the part it is playing to further our common and paramount objective—winning the war. I am afraid that under the stress of more immediate problems, we have sometimes neglected this part of our job. Perhaps we shall do better in the future.

Some may ask why acceptance and understanding by those whose prices are being controlled is necessary. The Congress has declared that inflationary prices are contrary to the public interest. The Congress has spoken, why then try to convince anyone that he ought cheerfully to accept that fact? Regulation is, after all, the child of necessity. Let there be grumbling and complaining—the public interest is being served. Thus the argument might run.

I do not hesitate to say that any such approach would destroy our principal objective. Price control does not bring the force of law to bear upon some particular excrescence of private business like corporate buccaneering with holding companies or the mishandling of investors' funds. Rather it is aimed against the very normal practice of pricing goods for the greatest gain, a sound, honest and legitimate business policy in our erstwhile peacetime economy. A law which in effect makes ordinary business policy contrary to the public interest cannot be successfully administered unless its necessity is accepted by those whom it affects.

Naturally, I do not believe that it is ever possible to have the complete and wholehearted support of an industry for a truly effective price regulation. War or no war, there are always some who will resist any move to reduce their prices or curb their profits, and some who will feel very strongly about it. I am always a little doubtful, therefore, when told that one of our price regulations has the wholehearted support of the entire industry. Human nature being what it is, I have the uneasy feeling that the ceiling must be too generous.

But with the exception of those who may be termed the unconscientious objectors, the Price Administrator must strive for business acceptance of his regulations. By acceptance I do not mean a positive preference for restraint as compared with no restraint but I do mean recognition of the basic fairness and necessity for the regulations. The average American will question the necessity for restraint, particularly if it touches his traditional rights or his pocketbook, more carefully than the citizens of most other nations. But once convinced that the restraints are necessary and fair, he can be counted on for thorough cooperation.

You will note that I have referred to both necessity and fairness. The former results from forces outside the control of the price agency. But the latter is our sole responsibility.

The elements of fairness, as I see them, require that all our regulations conform

to a well-defined over-all policy, and that the administration of these regulations be such that no one is justified in feeling he has been discriminated against. I am not particularly perturbed that some people desiring to be excepted from a general restriction may be annoyed at their failure to obtain special treatment. But no degree of vigilance against the converse situation can be too great.

To date I feel that we have been reasonably successful in obtaining understanding and acceptance from those whose prices have been fixed. This may be because we have been in that easy stage in which business profits have been large enough to heal many wounds. I hope that we may be as successful in the more difficult days ahead for, unless we are, there is little chance that price control itself will succeed.

WARTIME PRICE CONTROL AND THE PROBLEM OF INFLATION

J. M. Clark*

1. *Inflation and the Normal Function of Price*

Everyone opposes "inflation"—or nearly everyone. And everyone agrees that war brings on inflation if it is allowed to run its natural course unresisted. But there is no real agreement as to just what "inflation" is. On the whole it seems best to consider that what we are talking about is harmful price increases of a widespread or general sort, and then go on to examine the things that do harm, and the kinds of harm they do; and forget this ill-defined and controversial term. So far as the term is used in this article, it will mean simply general price increases of harmful magnitude.

In ordinary times, it is customary to say, price is the agency which brings supply and demand into equality with one another, allocates productive resources between different products, determines how much of each shall be produced and limits demand to the amount that is available. This is a shorthand form of statement, and in some respects a bit misleading. The chief misleading implication is that production responds only to price; and, if supply is short of demand, production will not increase except as price rises. It is true that in such a situation price will usually rise, and production will increase; but this leaves out the most essential part of the process: namely, an increase in the volume of buying orders. In a large-scale manufacturing industry, this alone will ordinarily result in increased output. Both the increased production and the increase in price (if the latter occurs) are the result of the increased volume of orders. Price may not increase immediately, or at all; though it is likely to, since the pressure of competition on price will be reduced. It is more correct, then, to say that under ordinary circumstances production is governed by the volume of the buyers' demand, unregulated except by price, and by the willingness of the producers to supply the goods demanded, at the price that can be got.

The main regulator of the price factor in this combination of forces is the competi-

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Views herein expressed are the personal views of the author and do not necessarily represent those of the Office of Price Administration.

tion of the producers with one another; though where this does not work properly, for reasons unavoidably rooted in the nature of the industry, prices may be regulated. If the demand for a competitive product increases, profits and possibly prices will increase, but not inordinately and not for long, because they will so promptly stimulate an increased output. The successful operation of the free-market regulators depends on the flexibility of production and productive capacity, relative to the shifts that are called for. If production is highly flexible, or if only moderate movements are called for, these movements may be engineered with only moderate incentives in the way of profit or loss, and without throwing the whole scheme of values into confusion. Under these conditions, profits and losses are accomplishing something that needs to be done, and are doing it at a moderate cost.

The serviceability of the market mechanism is clearest where it is a case of particular movements in a limited number of products. Where general movements are concerned, the operation of the mechanism is not so simple, and its serviceability is much more doubtful. In fact, economists are pretty well agreed that large and sudden general upward and downward movements in the price structure, which are regularly connected with general expansions and contractions of production, are regularly harmful. This is partly because the alternations of booms and depressions with which they are connected are not healthy features of our economy; and partly because they create injustices between different groups. A dollar with shrinking purchasing-power robs creditors and fixed-income groups generally, and has in the past proverbially fattened profits at the expense of wage-earners, since wages have regularly lagged behind the rise of prices. Under present conditions, with labor organization more widespread and stronger than ever before, this last feature is not observable; but there remains a discrepancy between workers who are in a position to secure an adequate increase in wages promptly, and those who are not.

To sum up, then, the general presumption in favor of unregulated price movements does not automatically apply to the kind and degree of increase which tends to result from an all-out military mobilization of the economy. What remains is the fact that authoritative controls are clumsy and difficult to manage, and produce widely-ramifying effects, many of which are difficult to foresee and handle. They also require substitute methods of stimulating or restricting supply, restricting demand where necessary, and allocating scarce supplies between conflicting demands. In this sense the "law of demand and supply" still has to be reckoned with. But the country has a standard of values, based on the vital requirements of war, which does not depend on demand as expressed by orders, at a price, in the markets; and it has ways of making these values effective without either ignoring price or acquiescing in the course which unregulated markets would take.

2. *Armament Drive Without Controls*

The normal effect of an armament drive is compounded of several elements. First is the direct demand for weapons of war, with the accompanying derived

demand for labor, materials and productive equipment. Second is the methods used in financing the necessary outlays. Third is the reaction of the whole on the private demand for ordinary civilian products, and on the available supplies of these products. Fourth is the reaction of the market mechanism itself to disturbed conditions and anticipated changes, including speculation, inventory accumulation and hoarding. Underlying the whole are likely to be disruptions of normal supply lines for a large number of imported commodities.

The direct demand for war munitions calls, in the first place, for many things the country is not equipped to produce, such as ships, tanks and war-purpose airplanes in enormous quantities. Here we encounter the drawbacks of the mass production which has been the key to our industrial efficiency; for our plants are characteristically equipped with highly specialized machinery, suited to doing one thing and turning out one product or working on materials of a limited range of size and composition. So plants must be re-tooled or new plants built, and this may take a year or more. Ultimately, production will be huge, but, in the meantime, possibilities of increasing output are severely limited. First comes a more-than-capacity demand on the facilities to produce machines, and to produce the machines-to-produce-machines. Machine tools become the first bottleneck, and one of the sharpest.

Demand soon begins to make heavy drains on the basic materials, including lumber for army camps, a wide assortment of metals, and some chemicals. Shortages come in sight, but are hard to predict, partly because the program is a rapidly growing thing, and partly because its effect on civilian demand is uncertain. The problem arises of increasing capacity for the production of these basic materials. If we had known, when France fell, all that we know now, we should undoubtedly have undertaken at once the construction of such increased capacities in a number of materials, shortages of which are now necessitating the curtailment of civilian production. But producers were reluctant to gamble heavily in this direction, feeling sure that they would be left, after a few years, with excess capacity on their hands, and facing all the ills which this brings with it. Some expansion was undertaken; but, in terms of the demands now revealed, it was insufficient.

The basic characteristic of this situation is that demand for many things comes to exceed the supply that can be made available within a considerable period of time; and the dominant demand is of a peculiarly insistent sort. Government must have vital munitions, and will not be deterred by high prices. It will spend as fast as the supplies can be obtained, borrowing the funds if it does not possess them. Under such circumstances, prices cannot be trusted to rise merely enough to stimulate increased production; they can easily go far beyond the maximum amount that serves any substantially useful purpose of this sort. Even high-cost producers may make very large profits. The high prices serve to determine, among civilian wants, which shall be served; but they do not do this in any stable or useful fashion, largely because of the cumulative spirals which such a situation breeds. It does not lead to a stable

equilibrium. And it may result in raising the prices of necessities of life, and thus create real hardship for those who have small incomes and cannot increase them.

Such an economic mobilization has two dimensions: the mobilization of management, labor, materials and productive equipment; and the mobilization of funds to pay for the resources used. From the standpoint of inflation, the problem may be described as one of maintaining a good working balance between these two dimensions, in order that monetary demand may not get too far out of touch with attainable supply. Of the two, the material resources are the critical thing—granted these, funds to move them can always be found, somehow. But from the standpoint of inflation it makes a great deal of difference how the funds are found, and we are learning much more about this than we suspected during the first World War. Material mobilization, under conditions such as ours in 1940, is a mixture of transfers of resources and increase of total output. Until the summer of 1941, it was possible to increase defense production and civilian production both at once. In a roughly corresponding way, financial mobilization is a mixture of transfers of dollar resources (taxes being the clearest case) and methods which increase the total amount of money funds or of active funds (expansionary borrowing). And one of the significant new things in the defense drive of 1941, so far as this country is concerned, was the growing recognition of the need for some kind of quantitative correlation between financial expansion and economic expansion.

On past occasions, the outcome has been a compromise between repugnance to heavy taxation and repugnance to heavy public debts. One side has urged putting the burden on future generations; the other has demonstrated that this cannot be done, because you cannot stop present enemies with shells which future generations are to make. The arguments have not met, because one bore on the fiscal burdens and the other on the physical ones; and neither bore on the quantitative question how far to go with each policy. The financial terms in which this question has customarily been argued appear to be largely obsolete, and others are finding their way into use.

The situation drives well-nigh irresistibly toward financial methods which put government's monetary demand into the markets without decreasing the total of civilian monetary demand, but more likely increasing it. Only a small-scale defense drive, or the early stages of a large one, can be financed in this way without encountering the limits of physical power to increase production as fast as monetary demand increases. The natural result is price-inflation.

The process begins with the materials on which armament makes the heaviest demands, relative to quickly available supplies. From these it spreads, by a process the details of which may vary according to conditions. Rising prices of basic materials affect the cost of producing goods in general, while demand increases through the spending by civilians of the increased money incomes received for defense work. Dealers bid to replace their stocks, and something more, and inventories grow, thus intensifying the increase in demand as it reaches the manufacturers and the producers of materials. To this is likely to be added a purely speculative demand, creating

scarcities in advance of any real shortage. Wholesale prices rise, and this is reflected in retail prices after a lag of weeks or possibly months. If the public and the Government have a stern eye on prices, dealers are especially likely to postpone increases until goods bought at earlier and lower prices have been disposed of. But costs of living do rise.

At this point, if not earlier, there will be a general demand for higher wages to offset the cost of living. In the present instance the demand came earlier, and there was a fairly general round of wage increases in the spring of 1941, in which the steel industry played a leading part, while the cost of living had not risen more than about 3%. Many industries could absorb these wage increases out of the economies of increased output, but not all. And these economies reach an end and may be reversed as less skilled labor has to be employed, or overtime and night shifts worked. Ultimately, if the process is left to itself, a wage-price spiral appears, in which wages and the cost of living pursue one another and drive one another upward, with no easily assignable limit. Such a movement is clearly useless as a means of mobilizing resources for war needs, and in other respects is thoroughly harmful.

While prices are free to rise, profits are likely to increase, and such profits represent a reward for scarcity rather than for superior efficiency, and arouse more justified discontent than any other single feature of the situation. For a while, also, so long as munitions do not absorb more than the possible increase in total product, wage-earners may have more to consume. A really all-out military effort, however, will not permit this; and then the attempt to maintain the workers' consumption by raising wages proportionally with the cost of living becomes largely self-defeating. If there are no more goods to be had, increased money incomes will not buy more, but will merely bid up prices if the money is spent, thus necessitating a further wage increase if the hopeless pursuit of parity between wages and cost of living is to be continued. The process tends to obstruct production by multiplying the occasions for strikes, as well as increasing the uncertainties which hamper the forward planning of business. Perhaps the worst sufferers are those who must live on fixed or relatively fixed incomes, for their dollars shrink without possibility of compensation.

Inflation also increases the dollar cost of arming. So far as this cost is supported by current taxes, the increase is mainly nominal, since the tax yields increase also, though perhaps not in quite the same proportion, and yields of income taxes will, of course, lag. As to outlays financed by borrowing, the fiscal effect hinges on the course of prices in the long run, after the emergency is over, and is only part of the larger effect which the post-emergency course of prices will have on the whole state of the economy. The most obviously probable outcome is the collapse of the inflated price-structure; and this will intensify the depression which is likely to follow, and increase all the difficulties of resuming an orderly course of economic life. Financially, it will leave the Government paying interest and principal, so far as it may repay principal, in more expensive dollars than it borrowed. There are other possible outcomes, but none is free from serious drawbacks and dangers.

Possibly this incomplete sketch will serve to indicate the main evils of an uncontrolled price structure in time of war or a major emergency, and the reasons why a determined attempt at control is imperative. The experience of the first World War showed that controls can accomplish something, though in that case the attempt did not begin until the greater part of the inflation had already occurred, and it was too late to do more than set limits on the movement and bring a greater degree of order into the chaotic labor market. The principle of raising wages to match the rising cost of living was widely applied, while wages in numerous essential industries rose more than this. Thus average "real wages" rose, though it is doubtful if the real consumption of the workers did so.

As to prices, a rough gauge of the effectiveness of control is afforded by a comparison of the average prices of commodities which were at some time controlled, with those which were not.[1] In round numbers, the controlled commodities had on the average about doubled in price at the time controls were instituted, while the uncontrolled group had risen roughly four-fifths as much. During controls, average prices of the controlled group were nearly stabilized, while those of the uncontrolled group gradually caught up. This average picture, for the controlled group, is probably less representative than most averages, since there were some prices which continued to rise markedly, and others which had already risen so far that it was possible to bring about very considerable reductions. Had controls been initiated much earlier, the total rise would undoubtedly have been less, but there would have been a substantial rise in the controlled group subsequent to the setting-up of controls. Applying this experience to our present situation, we have instituted controls soon enough to have considerable preventive effect; and if all elements of the program work together properly, we may hope to forestall any inflation-spiral comparable to that of the first World War; but it would be too much to expect that controlled prices should be permanently and completely stabilized. However, up to November, 1941, prices subject to formal "ceiling" orders, as distinct from informal controls, remained substantially stable.

3. *Objectives and the Factors that Condition Them*

The objectives of price policy in a national emergency may be inferred in a general way from the foregoing sketch of the evils we wish to avoid. But when it comes to making the objectives sufficiently specific to furnish guides in the actual doubtful decisions with which an administration is faced, we must consider them in the light of the conditions which determine how far it is possible to go and at what point one desirable objective may have to be sacrificed to another.

The primary objective, to which all forms of policy must contribute, is to secure the necessary munitions of war. We want to do this with as little disturbance to prices

[1] Fuller data can be found in Garrett, *Government Control over Prices*, WAR INDUSTRIES BD. PRICE BULL. No. 3 (1920), pp. 414-563. Many of the commodities in the "controlled" group were under actual controls only during the later months of the period covered; but informal pressures and the imminence of formal controls had some effect.

as possible, but any price increase which is genuinely necessary must be allowed. Furthermore, one thing which must be kept very firmly in mind is that the amount of war material needed is not properly to be regarded as limited by any particular program or by the appropriations in force at any particular time, but solely by our ability to turn out the goods. The program has been increasing and will inevitably increase further. If, at any time, we find that we are fully living up to the program as it then stands, that is a sign that it is time to revise the program upward. Viewed in this light, there is simply no such thing as meeting the requirements of arming and also the full amount of civilian demands. The military program is inadequate unless it expands until civilian demands are interfered with at a good many points, and very materially.

With this proviso, then, we still want as much civilian production as is consistent with armament needs. We are going to be adequately fed, and with reasonably good management we ought to be better fed than usual in the past, from the standpoint of health. We are going to be adequately clothed, and, outside of centers congested by war work, we shall be as well housed as usual. But sharp curtailments have become necessary in consumers' durable goods which make heavy demands on the metals needed for ships, tanks and aeroplanes. And there will be shortages in other directions. At present, the limiting factor is mainly shortage of these key materials, and products which do not make heavy demands on them will continue to be produced even if nonessential. But the list of limited materials is growing.

A later stage may come at which we shall press against the ultimate limits of our man-power, and if this happens, we shall then not be able to afford labor for really nonessential products. At present, we are probably nearing this situation, and while it is really important that the production of nonessentials, which do not compete with defense, should continue (not so much because it is important for consumers to have these products, as because it is important for the workers who make them to have jobs) this situation will change as fast as the making of arms requires the labor now engaged in making otherwise noncompetitive nonessentials. The ideal of conversion to defense work without intervening unemployment, is not completely attainable. In some cases, temporary unemployment may be incidental to putting pressure on employers to use ingenuity and determination in solving the problems of conversion. The all-out war program has forced a more rigorous attack on this problem.

The limitations on production are of various sorts. In some cases we have reached the absolute limit of our productive capacity with existing facilities. This is not an absolute limit in the long run, but raises the question whether it is advisable to take the materials and labor which are necessary to enlarge the existing productive capacity. If the capacity is insufficient for military needs alone, there is no real question; but if it is merely a matter of failing to meet the full civilian demand, expanded as that is by a large flow of money income, then the question becomes more difficult.

Some products it may be possible to increase, but only by incurring abnormally

high costs for all or a large part of the supply. Products which are wholly or largely imported are in this class, and here an increase in price is unavoidable. In other cases it may be only a small percentage of the product which is produced at abnormally high costs and which requires an abnormally high price to bring it into the market. In such a case a one-price policy would give large profits to most of the producers for the sake of securing an extra 2% or 5% of output. In such cases it is possible to secure the extra output without paying the high price for the whole supply, provided we are willing to undertake whatever administrative burdens and difficulties are involved in a differential-price system, or some other way of meeting the same difficulty. The present administration has from the start been prepared to take such measures, and is now employing them.

We are also in sight of some of the more general limitations on our power to produce. The problem of skilled labor is being met by a training program, though the problem of moving the labor to the places where the war work requires it, and of providing housing facilities, is not an easy one. Back of this lie limitations on the capacity of our transport system, and our capacity to produce electric power. Increasing the power supply, in particular, will require both large amounts of steel and large amounts of time; and in the meantime there is very likely to be a real shortage. The most general limitation, of course, is the limit on the supply of labor capable of being trained to the necessary skills and put to work in the essential industries. This limitation is an indefinite and an elastic one, and cannot be clearly measured by merely counting the number who are at present classified as unemployed. Some of these unemployed will not prove usable, but on the other hand many who are not ordinarily in the market for employment can be drawn upon in a real emergency. The ultimately available supply of labor is larger than the number ordinarily rated as "gainfully employed." Even at present, before all of the unemployed have been absorbed, we have begun to draw on this reserve of persons not normally in the labor market.

Another objective is to allocate scarce products and scarce productive resources to the most important uses. And for purpose of determining which are the most important, we shall not be satisfied to be governed by the test of willingness and ability to pay a price in an uncontrolled market. We face situations in which this would mean injuriously high prices, and those who can afford to pay them may not be those to whom the products are most important. This raises the question of administrative allocation or rationing.

One phase of this problem is the need of keeping enough of the real necessities within the reach of everyone. So far as we can now foresee there will be no real difficulty in doing this, so far as supply is concerned. It will be mainly a matter of preventing general and violent inflation of prices.

Another objective is the avoidance of so-called "profiteering." This has sometimes been expressed as an absolute determination that no one shall be allowed to make a profit out of his country's danger. Such a rigid formula sets an impossible standard.

Producers will necessarily incur some uncertainties and some will come out better than others. If we actually see to it that those who come off best make no profit, others will inevitably take losses. There will be many differences in cost of production of products which will necessarily be sold at a standard price, since it will not be practicable to follow a universal policy of paying different prices to different producers for the same products. What is practicable is to see that prices are such that profits of arms production shall not be, on the average, much above normal levels, especially after deducting taxes, including an excess profits tax. Even the excess profits tax cannot usefully be so levied and administered as to take 100% of all profits above any determined level. There may be cases in which it will seem expedient to allow increased prices to do a good deal of the work of rationing scanty supplies. In such cases a specific excise tax on the particular commodity may solve the problem of permitting high prices without also permitting unearned profits.

Another obvious objective is to prevent the effect of actual shortages from being intensified by purely speculative activities, which may at times lead to useless hoarding, and may cause a shortage to arise merely because one is anticipated.

Two other matters on which real national objectives particularly need to be defined are farm prices and wages, which threaten to clash in an endless inflationary pursuit-race. To restrain inflation requires a resolution of this contest.[2]

The Price Control Act of January 30, 1942, defines limits below which farm prices may not be forced by price-ceiling orders, either directly or *via* ceilings on products processed "in whole or substantial part from any agricultural commodity."[3] This represents, not a national objective but a pressure-group objective, and is calculated to ensure progressive inflation. The more moderate standard of "parity," announced as an approximate guide to policy by the Secretary of Agriculture and the Price Administrator, depends for fulfilment on other measures than price-ceilings—chiefly, perhaps, on the release of stocks of grains and cotton.

As to wages, the Act instructs existing Government agencies dealing with wages "to work toward a stabilization of prices, fair and equitable wages, and cost of production."[4] This presents both a problem of reconciliation of objectives, and a problem of implementation. So far, compulsory wage ceilings have been considered both undesirable and impracticable, even under war conditions. To sum up, objectives in these two crucial fields depend on administrative definition and action, and the two have not been brought together in one formula.

4. *Methods of Price Control*

One of the soundest and most obvious methods of forestalling an increase in prices is to insure an adequate supply. The Government has been concerning itself with this matter in a number of ways. Where increased facilities were needed, one of the problems to be met has been the uncertainty as to how long the facilities

[2] *Cf.* J. M. Clark, *Wages and Prices in All-Our War* (Feb. 1942) 31 SURVEY GRAPHIC 85.
[3] Pub. L. No. 421, 77th Cong., 2d Sess. (1942) §3(c).
[4] *Id.* §1(a).

would be useful. In some cases it has been sufficient to allow the producer installing the facilities to include, for tax purposes, amortization charges on a five-year basis In more difficult cases, the Government has assumed the burden of furnishing capital. Another policy which has been followed has been the attempt by the Government to build up stock-piles of critical and strategic commodities. In some cases it has been possible to forestall purely speculative shortages by merely disclosing the facts as to existing supplies.

The most direct contact which the Government has with prices is in its own buying. Here one of the first requirements is a unified or co-ordinated purchasing system, under which different departments, and allied purchasing authorities, will not be working at cross purposes and bidding against one another. The most usual method of public purchase is by competitive bidding, but this has severe limitations in a national emergency. It makes an efficient distribution of orders difficult; and the lowest bidder is by no means sure to be the one to whom the order should go, in the light of the amount of business he already has and the labor situation which may result from his securing the order, or failing to secure it. For war mobilization, it is practically necessary to rely to a large extent on directly negotiated prices. These prices may be fixed by contract, with or without provisions for adjustments in case of certain kinds of changes in cost. In some cases it is practically necessary to make contracts on the basis of cost plus a certain margin. The crude form used in the first World War—cost plus a percentage of cost—has been discarded in favor of cost plus a fixed margin, which may be a percentage of an estimated standard cost, determined in the contract.

Government buying, however, for the most part, does not directly affect prices of things which are dealt in in the general market, though it may influence the price of basic materials. For such things, direct governmental control must take the form of determining the price which private individuals will have to pay. Within this field there are various broad divisions, which require different treatment, and which may expediently be handled by different agencies. In the first World War, for example, the Price Fixing Committee of the War Industries Board concerned itself with basic materials while there was a distinct food administration and a fuel administration, and rentals were handled by local committees.

Control of basic materials sold to producers raises one set of problems, while control of finished consumers goods, especially at retail, raises a different set of problems. In the case of basic materials the control is easiest where there are fewest producers to deal with; in short, where the situation is least fully competitive. The markets for scrap metals have been harder to control than the prices charged for the same metals by primary producers.

Finished consumers' goods are not only vastly more numerous than the basic materials, but involve baffling complexities in the matter of quality. This question becomes peculiarly difficult at a time when war-created shortages require a great many substitutions for customary materials, and it becomes necessary to determine

whether these involve a deterioration of quality against which the consumer should be protected, or an evasion of measures of price control. Control of prices without some control of quality is fatally incomplete, yet control of quality throughout the entire field of consumers' goods is an administrative impossibility. Something may be done, as was done by the Food Administration during the first World War, in the way of control of producers' margins, but this in turn is complex and difficult, and cannot secure very precise results. It seems clear that direct control of price can operate only with reduced precision and increased difficulty, outside a somewhat limited field.

The standards appropriate to this kind of control are decidedly different from those which have been used in the past in the control of public utility rates. Prices will apply to a number of different producers, often a very large number, and it is a commonplace that there are always some producers who are losing money, at any price the market may set. There is not much danger that prices will be set so low that large and efficient producers will not make a "fair profit." The necessity of bringing into the market some higher-cost producers will ordinarily take care of that. The real question is one of fixing a price which will bring in the needed supply; and for the higher-cost producers the decisive question will be whether they can earn anything above operating expenses. If so, they will be doing as well as competition ordinarily permits the higher-cost producers to do.

One way of approaching this kind of price-fixing is to fix the price at the level which prevailed on some actual date, selecting a date when the price was clearly sufficient to bring out the needed production. This will be virtually certain to yield better returns than competition affords on the average of good and bad times.

There are many specific problems, too numerous to go into in detail. One is the problem of whether it will be sufficient to fix the price of a few key types or grades of a particular commodity, and trust the other types and grades to be priced in reasonable harmony, or whether it will be necessary to make completely comprehensive price schedules covering all types and grades, or all differentials from basic prices. Dealers' margins also present their own peculiar problems. It is sometimes necessary to see to it that the dealer does not evade a price order by requiring the purchaser to take also a certain quantity of some other product or products the price of which has not been controlled.

The most troublesome problem probably arises from the fact that demand will exceed supply at the prices fixed, and some form of allocation or rationing will become necessary. This is difficult enough where only sales to producers are concerned. To be really effective, it requires not merely the assigning of a rating to a given producer's requirements of materials for a given product, but a time schedule of deliveries to which the rating applies. But the scarcity of materials for producers is only a reflection of a coming scarcity of their finished products, and raises the question of allocation or rationing to the final consumer. In some of the milder cases it may be sufficient to allocate supplies to the dealers, and to leave it to the dealers to make them go around among their customers—as was done, briefly, with gasoline. Where this will not work, the Government may try rules limiting the amount that may be

purchased at any one time, but it is hard to prevent consumers from merely buying oftener, or buying from more than one dealer. The only really positive system is that of ration-cards: now about to be issued for sugar.

The most ambitious proposal for direct price controls has been made by Mr. Bernard M. Baruch, and represents the outgrowth of his experience as head of the War Industries Board during the first World War, and his attempt to cure the shortcomings revealed by that experience.[5] These were the shortcomings attendant on piecemeal methods of control, which could not attend to everything at once, and had no effective means of controlling many elements of cost. The proposal is for a comprehensive ceiling over all elements of the price system, including wages, interest, commissions and all forms of payment for services. The ceiling would be fixed at the levels prevailing at some given date: presumably one at which prices were still in a fairly "normal" relation to one another, though it would be likely to be installed after prices of essential defense products had risen sufficiently to afford some stimulus to increased production. These ceilings would be subject to revision upward for any single product or service on showing of necessity (or downward if the ceiling proved too high in any case). Thus the effect would be, not to prevent all change, but to require positive action to change any price ceiling. Mr. Baruch's expectation was that fewer specific price determinations would be required than under the system of piecemeal regulation. Movements of prices below the ceilings would be free of formal obstacles. The problem of high prices for imported products was met by the proposal for an export-import pool, which would lose money on imports, sold at domestic ceiling prices, but would make offsetting profits on exports. Fiscal and credit measures were also contemplated, operating to reduce excessive purchasing power in the hands of the general public, and thus to reduce pressures which might tend to break through the ceilings.

The basic principle of this plan deserves serious consideration, especially since a fairly close approach to it was put into effect by Canada in December, and has revealed no serious weaknesses during its first month and more of operation. The plan appears suited to deal with a specially urgent crisis, if business and labor can be convinced of the need for it and will give it united and sincere support. It will tend to be converted sooner or later into a comprehensive system of specific controls, *via* piecemeal revisions, but meanwhile it may render important service by holding the price structure, when it would otherwise get out of hand before the coverage of specific controls could be sufficiently expanded.

The success of this plan appears to hinge mainly on the practicability of establishing sufficiently full coverage, and to this there are great obstacles. Without labor's support, wage ceilings would surely fail. Even under a wage ceiling, wage costs would rise under the system of time-and-a-half for overtime; and premiums would probably be necessary to attract sufficient labor into some essential occupations. Opportunities for evasion would be many, including promotions and upgrading, paying

[5] His most recent statement was his testimony on the Price Control Bill. See *Hearings before the House Committee on Banking and Currency on H. R. 5479*, 77th Cong., 1st Sess. (Sept. 19, 1941) 989-1045.

learners at full rates, new designations of jobs, and other devices, some of which might be necessary and legitimate.

Unstandardized products would furnish another difficulty, especially work regularly done to special order or on contract, as in the case of construction work. Substitutions of materials, necessary or otherwise, and changed models of products, would require special action. Moreover, quoted prices include a surprising number of stipulations as to terms of delivery and settlement, which it might not be desirable to standardize yet which, if not standardized, might leave room for changes equivalent to an increase in price. Local differentials would often need to be adjustable, and representative past differentials may not suit existing conditions. Products whose prices move in seasonal cycles would afford a special group of problems.

Finally, while a blanket ceiling may be gradually converted into specific price orders, for many products, there appear to be areas that we can hardly expect to reach successfully in this way. In such areas, a blanket ceiling may have some effect, but inflation can hardly be prevented unless the inflationary pressures themselves can be limited.

This brings us to the last main group of measures tending to limit prices: namely, those which limit the flow of purchasing power which private buyers have available to spend. Increased government spending puts more money in the hands of private individuals, and increases their spendings also. Until midsummer of 1941, these increased spendings have called forth increased supplies; not fully proportionate to the increased spending, but still substantial. Now, with new munitions plants getting to the stage of quantity production, their demands for materials, especially metals, are necessitating sharp curtailments in the field of consumers' durable goods, and there is doubt to what extent this will be offset by increased physical volume of purchases in other fields, which are still free to expand without conflicting with armament.

The excess of income above supply of things to spend it on will increase—of that there can be little doubt. If spent, it will bid up prices by a truly mathematical necessity. If this is not desirable, then the excess income may be taxed away or borrowed away. It is not likely for long to lie idle, in amounts beyond a normal relation to income. Thus we arrive at the idea of preventing price inflation by levying taxes or floating loans intended to absorb private funds that would otherwise be spent. This is one conscious aim of our present fiscal policy, and accounts, among other things, for the issuance of nontransferable defense savings bonds; in contrast to the policy adopted during thet first World War, of urging subscribers to "borrow and buy," with the bonds themselves as collateral.

Space will not permit any extended discussion of the problems of taxation as affected by the attempt to graft this new objective onto the other objectives which have customarily governed tax policy. From this standpoint, taxation of the really generous incomes is of little effect, since it is likely to come mostly out of savings rather than out of consumption. It may actually have an inflationary effect if it reduces free savings below the requirements of capital expansion, and forces business to borrow from the banks. Increased taxation of incomes in the $5,000 to $10,000 range

will have a mixed effect, and the total effect on consumption to be expected from it is not very large. Taxation must reach the really modest incomes in order to bring about really material limitation of consumption expenditures. And there is a perfectly natural reluctance to lay really heavy burdens in this quarter, in the form of ordinary taxes. As the war effort expands, it is doubtful if any practicable tax program can wholly remove its inflationary effects.

Excise taxes are an ambiguous feature of such a program. They absorb the consumer's purchasing power; but, since he pays the tax with the price of the goods, it is a little less than obvious how it serves as a remedy for price inflation. Of course, it would be possible to legislate that the "price" of the taxed commodity should be defined as not including the tax, if juggling with terms would help. But there is a real and substantial difference between excise taxation and price inflation, in that true price inflation is cumulative, and the money represented by a price increase continues to circulate in the markets, while excise taxation does remove the money from circulation, and thus does really reduce excess purchasing power.[6] There is the further question whether this might be the occasion for wage demands to offset the increased amounts the purchaser has to pay for goods; but it seems probable that any form of taxation falling unmistakably on wage earners would be about equally likely to have this effect.[7] If the country can succeed in establishing the national wage policy which is so badly needed, one rational feature would be the general principle that in any wage adjustments aiming to offset increased costs of living, taxes are not a proper element to take into account. Otherwise the anti-inflationary effects of taxation could be largely nullified in one of the largest and most important sectors of consumption; and the possibility of using this instrument for preventing the evils of inflation would be seriously and perhaps fatally crippled.

The most important feature of excise taxation is its selective character, in contrast to income taxation, which can only reduce purchasing power in general, without doing anything to direct it away from those commodities, supplies of which have had to be curtailed, or toward those commodities and services in which expansion may still be possible. Excise taxation permits the short supplies to be rationed by a calculated increase in the gross price the consumer has to pay, where that may seem the most practicable method, without permitting the producer to pocket the increase as an unearned profit and to start it circulating through the markets as an added inflationary increase in the money flow. In this form price becomes a legitimately usable instrument for rationing shortages. This is important, since not only is direct consumer rationing a thing to avoid unless necessary, but the durable goods, in which the acute shortages are occurring, present peculiar difficulties. It is hardly practicable to tell the would-be buyer of a new automobile or refrigerator that he can have only

[6] Of course, the Government will spend the money it gets in taxes. But if it had not collected the taxes, it would have spent just as much, and private individuals would have more available to spend. Some of them might lend part of it to the Government (which would have to borrow what it did not collect in taxes), but they are morally certain to lend only a minor part. Most of the public borrowing thus occasioned would presumably come out of credit expansion.

[7] *Cf.* statement of Philip Murray, President of C. I. O., including personal taxes in the "cost of living" for which wage increases should be demanded. N. Y. Times, Jan. 27, 1942, p. 15.

half of one; and the difficulties of deciding who shall be allowed to have one, and who shall not, are obvious. However, curtailment of durable goods has suddenly become so drastic that excise taxes are in most cases likely to be inadequate.

Restrictions on credit, like taxation, may be selective or nonselective. An increase in reserve requirements is nonselective, though banks affected by it might follow selective policies in restricting their loans. The most naturally selective instrument in this field is instalment credit, which is obviously one of the most powerful factors affecting demand for just those durable goods which present the most acute problems. The great increase in purchases of automobiles and mechanical household equipment, which took place up to midsummer of 1941, was facilitated by a corresponding increase in the volume of instalment credit outstanding. Moderate limitations on instalment credit have been instituted, and can be developed into really effective restrictions on the demand for durable goods, where shortage is not too extreme.

The present policy of voluntary loans from individuals is entirely appropriate, but it will be effective as a remedy for inflation only to the extent that the individuals lend the Government funds they would otherwise have spent. If, as is likely, many of them merely invest with the Government funds they would have saved in any case, there is no reduction of inflationary spending. Ultimately, it appears that more positive measures in this direction will be called for, if inflation is to be effectively checked. This has led to various proposals for "siphoning-off" present income and giving the individual a deferred claim. This claim may be made available for him to spend at some future time when he may need it more than he does at present, and when the economic system may need the stimulus of added spending, as it does not need it now, to keep going at a fairly full rate of operation and to maintain employment. Extensions of the social security system have been suggested as one way of accomplishing this. Or it has been suggested that wage increases should take the form of government bonds rather than cash.

Among economists, there is general agreement that rising prices need to be combated not only by direct price controls but also by restricting wage increases and by fiscal and credit measures aimed to limit purchasing power. But there is some disagreement as to the relative emphasis to be placed on the several types of measures, and particularly as between direct controls and controls operating through purchasing power. Until recent months, some were reluctant to limit purchasing power heavily for fear that, if controls were strict enough to set effective limits on prices, they would also shut off some physical production of things that might be had without conflicting with defense. With the growth of the armament program, this fear has become groundless. The utmost practicable restriction of purchasing power will still leave inflationary pressures which will strain the machinery of direct price control and rationing.

Others see so clearly the difficulties and limitations of direct controls, especially perhaps the regimentation and rationing which it presupposes, that they are inclined to go to the other extreme, and place main reliance on measures acting through purchasing power. The fact seems to be that there is no chance of succeeding in

preventing very serious price increases unless both types of measures are used to the fullest extent. This calls for more powerful direct price controls than have been available to the Price Administration prior to the recent Price Control Act, and also heavier taxation than is yet embodied in proposed tax bills. They must both be used until they hurt. This implies that a man will feel hurt if some of his money income is taken away from him, because he feels that this reduces the amount of goods he can buy, even though the feeling may be wholly an illusion, because the amount of goods is limited by the needs of defense, and the consumer will be able to buy just as much with a smaller cash income as with a larger one, if all consumers are treated alike.

In principle, the most rational division of labor between the two types of policy would seem to be to rely on direct controls and selective limitations on buying power in the areas of special scarcity, while imposing general limitations on purchasing power sufficient, if supplemented by informal pressures, to prevent serious increases of prices in the general field of miscellaneous consumer-products in which no special scarcity or bottleneck has arisen. This admittedly makes the problem simpler than it is in fact. But unless some such division of the field can be worked out, the policy of preventing runaway price increases will fail.

5. *Conclusion: General Problems*

One thing which should be clear is that the task of preventing runaway prices includes a number of major elements, the actual handling of which belongs in various existing branches of the Federal Government other than the Price Administration. It requires a coordinated achievement of teamwork. The Price Administration is suited to the direct control of prices, but fiscal and credit measures are outside its field, and so also are any policies which may be attempted in respect to wages. What is needed, then, is a national price policy in which the various cooperating agencies shall play their complementary parts. The need is greatest in the case of wages and farm prices.

Both in forming and administering policy, one of the most important things is to set objectives neither too high nor too low. Those in charge of the different branches of the program must not expect too much of the other branches, nor demand too little of themselves. Until recent developments, lack of formal powers has necessitated rather modest objectives. With the added legislative powers now granted, more may be attempted, and must be if the attempt is not to fail; but it will still depend to a large extent on willing compliance by the majority of those affected. Courage and determination are needed.

Mistakes will inevitably be made. But mistakes can and will be rectified. What is most needed is general recognition that the emergency is serious, and that the dangers of uncontrolled inflation are more serious to all concerned than the burdens which control will inevitably lay on particular groups. Some general increase in prices appears bound to occur, even if a blanket ceiling is adopted and is reasonably successful. To prevent it from becoming disastrously great will require loyal and understanding support from all sectors of the nation.

THE EMERGENCY PRICE CONTROL ACT OF 1942: BASIC AUTHORITY AND SANCTIONS*

DAVID GINSBURG†

I. INTRODUCTION

Every comprehensive regulatory statute is, in a sense, an experiment in practical government. No legislative draftsman, however careful and informed, can determine in advance a statute's working adequacy. The statute itself is but a tool for the accomplishment of desired public ends, and its worth as a tool must be judged in and by experience.[1]

The most significant fact about the Emergency Price Control Act of 1942 is that the essential techniques of control which it embodies were developed and tried in actual experience. For more than a year before the introduction of the original price control bill, the Price Stabilization Division and the Office of Price Administration and Civilian Supply had been studying, and wrestling with, the hard price problem. Price action under executive authority continued throughout the six months during which the bill was pending before the Congress.

The lessons of that experience are now part of the Act. The wisdom of selective price control for a period when the country was just mustering its industrial forces, and the usefulness of base period prices in maximum price determinations, were proven in pre-statutory practice. The necessity for industry consultation, and the value of voluntary agreements, and of explanatory statements to accompany price

* The provisions of the Act authorizing the fixing of maximum rents for defense-area housing accommodations are dealt with in Borders, *Emergency Rent Control, infra.* The provisions relating to the issuance, protest, and review of regulations under the Act are discussed in Nathanson, *The Emergency Price Control Act of 1942: Administrative Procedure and Judicial Review, infra* at 60. ED.

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[1] This incidentally suggests the danger of trying to explain the meaning of particular language in the unique provisions of a law as broad and as flexible as this one, apart from the facts of a particular case, and even before that language has been interpreted in day-to-day operations in any case. It cannot be done. Although the interpretative opinions set forth in this article have been tentatively accepted by at least a few members of the staff, all of them have not yet been considered with the Administrator, and some of them are almost certain to be changed as new considerations are brought to bear on particular points. These interpretative opinions, therefore, will not be regarded as binding on the Office of Price Administration.

regulations became evident in the course of price action. The importance of the buying and selling powers was demonstrated by the pre-statutory use of that technique in connection with control of the supply and price of copper, rubber, wool, and numerous other stockpiled commodities.[2] Any fair evaluation of the pre-statutory activities of the Office of Price Administration and its predecessor agencies must be based upon full recognition that throughout that period those charged with responsibility for price stabilization were not only fighting a delaying action against inflation but were also sharpening the administrative methods now written into law. As our military production approaches full tide it may be necessary drastically to expand the field of price control, but individual price regulations, formulated in terms of base period prices appropriately adjusted, will undoubtedly remain keystones in the structure of price control, whatever form that structure ultimately may take.

To understand the essential continuity in the evolution of the price control program it is necessary to consider the successive stages of price stabilization authority. Consideration was given to the price problem from the outset of the defense effort shortly after the fall of France. On May 29, 1940, President Roosevelt established an Advisory Commission to the Council for National Defense and set up in the Advisory Commission a Price Stabilization Division, charged with a general responsibility for price stability.[3] The Price Stabilization Division, for a time, devoted its attention principally to close study and investigation of significant supply and price trends, stressing the expansion of supply as the best means of price stabilization. The results of the Division's studies and investigations were often made public, and, in many instances, announcement that no actual shortage existed, or that threatened price rises were speculative in character, was sufficient to stabilize important markets.

The unfolding of Axis strategy and the acceleration of the American defense effort soon created a condition of acute shortage in a number of essential commodities. More direct price action became imperative. The first price schedule was issued by the Price Stabilization Division on February 17, 1941, and announced a ceiling for second-hand machine tool prices, which had risen to fantastic heights. Five price schedules, in all, were issued by the Price Stabilization Division.[4] Although no direct and effective sanctions were available to secure observance of these schedules, the force of public opinion was sufficient to give them substantial effect.

[2] The procedure by which the copper problem was handled by cooperation between OPA and RFC was outlined by Leon Henderson before the Senate Committee on Banking and Currency. *Hearings before the Senate Committee on Banking and Currency on H. R. 5990*, 77th Cong., 1st Sess. (1941) (hereinafter referred to as *"Senate Hearings"*) 106 *et seq.*

[3] See Memorandum, "The Activities of the Price Stabilization Division and the Office of Price Administration and Civilian Supply," *Hearings before the House Committee on Banking and Currency on H. R. 5479, superseded by H. R. 5990*, 77th Cong., 1st Sess. (1941) (hereinafter referred to as *"House Hearings"*) 277.

[4] No. 2, aluminum scrap and secondary aluminum ingot, March 24, 1941; No. 3, zinc scrap materials and secondary slab zinc, March 31, 1941; No. 4, iron and steel scrap, April 2, 1941; No. 5, bituminous coal, April 2, 1941. On April 15, 1941, the Administrator of OPACS adopted the price schedules of the Price Stabilization Division. See Memorandum, "The Present Price Control Authority of the President and the Office of Price Administration and Civilian Supply," *House Hearings* 373, 374.

On April 11, 1941, the President issued Executive Order No. 8734,[5] which established the Office of Price Administration and Civilian Supply and authorized the Administrator of that Office to:

2(a) Take all lawful steps necessary or appropriate in order (1) to prevent price spiraling, rising costs of living, profiteering, and inflation. . . .

(c) Determine and publish, after proper investigation, such maximum prices, commissions, margins, fees, charges, or other elements of cost or price of materials or commodities, as the Administrator may from time to time deem fair and reasonable; and take all lawful and appropriate steps to facilitate their observance.

Executive Order No. 8875,[6] issued by the President on August 28, 1941, lodged the civilian allocation functions earlier vested in the Office of Price Administration and Civilian Supply in the Office of Production Management, but the price control authority conferred by Executive Order No. 8734 was continued in the Office of Price Administration, the successor to the Office of Price Administration and Civilian Supply. The scope of price action was greatly broadened and, as new industries were brought under price regulation, the need for direct sanctions to secure the observance of price schedules was increasingly felt.[7]

Meanwhile, on July 30, 1941, the President had sent to the Congress a vigorous message,[8] calling attention to the existing threat of inflation and recommending the immediate adoption of legislation giving the Office of Price Administration adequate powers to establish and to enforce maximum price and rent regulations. Two days later the original price control bill[9] was introduced in both Houses of the Congress. The bill was before the Congress for six months, the hearings of the House Committee on Banking and Currency alone lasting until the end of October.[10] After three more months of heated Congressional controversy, in which the bill narrowly escaped emasculation by the House of Representatives,[11] the Emergency Price Control Act[12] became law on January 30, 1942.

[5] 6 FED. REG. 1917 (1941). [6] *Id.* 4483.

[7] The sanctions available under Executive Orders Nos. 8734 and 8875 are indirect and cumbersome. Par. 2(h) of Executive Order No. 8734 empowers the Administrator to recommend to the President the exercise of such of his powers as the commandeering power, Selective Service Act, §9, 54 STAT. 892 (1940), 50 U. S. C. A. §309 (Supp. 1941), and the priority power, Priorities Act, §2(a), 54 STAT. 676 (1940), as amended by the Vinson Act, Pub. L. No. 89, 77th Cong., 1st Sess. (May 31, 1941), when in the judgment of the Administrator such action by the President would enforce compliance with price schedules.

[8] H. R. Doc. No. 332, 77th Cong., 1st Sess. (1941), reprinted in *House Hearings* 2-4.

[9] H. R. 5479, S. 1810, 77th Cong., 1st Sess. (Aug. 1, 1941).

[10] The printed House Hearings run to a total of 2,305 pages.

[11] The House Committee substituted for H. R. 5479 a modified bill, H. R. 5990, which adopted the original procedural and judicial review provisions but made such changes as omission of the licensing and treble damage sanctions and the restriction of buying and selling powers. See H. R. REP. No. 1409 (hereinafter called *"House Report"*). After four days of debate, 87 Cong. Rec., Nov. 24-28, 1941, at 9297-9326, 9333-9378, 9383-9418, 9436-9483, the House passed a price control bill quite different from that recommended by its Committee and wholly inadequate for the job of emergency price control. For example, every action of the Administrator was subject to complete re-examination and revision by a Board of Administrative Review.

The essential provisions omitted by the House Committee, or stricken on the House floor, were reinstated by the Senate Committee on Banking and Currency, after it had invited OPA representatives to submit recommended changes in the House Bill. *Senate Hearings* 72-105. Substantially as reported by

The transition from price action under executive authority to price action under Congressional authorization was effected with no break in the continuity of the price program. Leon Henderson, who had headed the three pre-statutory price agencies, was appointed Price Administrator under the Act and took office on February 11. In accordance with the express provisions of Section 206 of the Act,[13] price schedules issued by the Office of Price Administration and Civilian Supply and the Office of Price Administration prior to February 11, were re-examined, revised, and substantially all of them continued in effect, as if issued under the authority of the Act.[14] In fact, since the basic techniques of control embodied in the Act were those which had been developed in pre-statutory experience, the Office of Price Administration was able to continue its essential administrative operations without substantial change.

But times and values have changed markedly since the form of the statute was finally determined. In the fall of 1941, although death and destruction destined for this country were already being loaded into Axis bomb-racks, the Government was forced to compromise its necessity, and cautiously clothe that compromise in the peace-time habiliments of administrative law. This was necessary to secure price control legislation of any kind. Will that compromise suffice for war?

To this question there is no single unqualified answer. Appropriations are needed to recruit a competent staff and to establish numerous offices in the field.[15] Hostile forces may seek to limit those appropriations and thus hamstring successful administration. Living quarters and office space must be provided to house the staff. Washington is a crowded place, yet decentralization before policy has been determined is extremely difficult and dangerous. Moreover, the task of price control is after all a limited one; alone it cannot succeed in preventing a disastrous inflation. Other agencies responsible for the supply and flow of goods and for the Government's labor, fiscal and monetary policies must share the responsibility and the burden. The growing volume of excess purchasing power must be reduced. Widespread

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the Committee, SEN. REP. No. 931, 77th Cong., 2d Sess. (1942) (hereinafter called *"Senate Report"*), the bill passed the Senate after four days of debate, 88 Cong. Rec., Jan. 7-10, 1942, at 68-90, 99-136, 165-194, 217-252, and was referred to Conference Committee. The Conference Committee adopted essentially the Senate bill. H. R. REP. No. 1658 (hereinafter called *"Conference Report"*). The recommendations of the Conference Committee were adopted by the House on January 26, after a motion to recommit had been defeated by only 210 to 189, 88 Cong. Rec., Jan. 26, 1942, at 710-711, and passed the Senate on Jan. 27 by an overwhelming vote. *Id.* at 750.

[12] Pub. L. No. 421, 77th Cong., 2d Sess. (1942).

[13] "SEC. 206. Any price schedule establishing a maximum price or maximum prices, issued by the Administrator of the Office of Price Administration or the Administrator of the Office of Price Administration and Civilian Supply, prior to the date upon which the Administrator provided for by section 201 of this Act takes office, shall, from such date, have the same effect as if issued under section 2 of this Act until such price schedule is superseded by action taken pursuant to such section 2. Such price schedules shall be consistent with the standards contained in section 2 and the limitations contained in section 3 of this Act, and shall be subject to protest and review as provided in section 203 and section 204 of this Act. All such price schedules shall be reprinted in the Federal Register within ten days after the date upon which such Administrator takes office."

[14] As required by §206, these price schedules (101 of the 105 originally issued) were reprinted in the Federal Register on Feb. 21, 1942. 7 FED. REG. 1202-1406.

[15] Regional offices have been established in Atlanta, Baltimore, Boston, Chicago, Cleveland, Dallas, Denver, Kansas City, Mo., New York, Philadelphia, and San Francisco.

rationing of consumer goods and perhaps incomes must be undertaken. Assuming, however, a willingness on the part of the Congress to back effective price control, and the existence of a sound complementary executive policy, the law, notwithstanding its limitations, is probably strong enough and flexible enough to carry out its mission in the war against inflation. But that war—and perhaps another—will not be won unless we strike boldly and swiftly on all fronts now.

II. COMMODITY PRICES

The price control contemplated by the Act is control over the maximum prices of all articles, products, and materials, whether raw materials, foodstuffs, or finished products, and whether at the manufacturer's, wholesaler's, or retailer's level.[16] This authority extends over exports and imports and over sales and purchases by the United States and the states, or any agencies or subdivisions of either.[17] But the Act does not become effective except through regulations or orders issued by the Administrator. No matter how carefully considered or artistically phrased, no single statutory rule would be adequate to meet the myriad contingencies of all-inclusive price control.[18] As will appear, the Administrator is left free to make full use of differing formulae and techniques in determining, with respect to each commodity, a maximum price that is generally fair and equitable and which will accomplish the purposes of the legislation.

Section 2(a) of the Act contains the basic grant of authority to control commodity prices.[19] The Administrator may act whenever, in his judgment, the price or prices

[16] Exempt from the coverage of the Act are wages and salaries; professional fees; public utility rates; insurance rates; rates charged by persons engaged in operating or publishing newspapers, periodicals, or magazines, or in operating radio broadcasting stations, motion picture or other theater enterprises, or outdoor advertising facilities. Exempt, also, are materials furnished for publication by any press association or feature service, and books. But included are services rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales, of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity. §302(c). *Cf.* §205(f)(1), establishing certain exemptions from the licensing provisions of the Act.

[17] "The term 'person' . . . includes the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing." §302(h).

[18] The three thousand pages of Senate and House Hearings constitute perhaps the best treatise extant on the problems of price control. See particularly *House Hearings* 237-301.

[19] Section 2(a) is in part as follows: "Whenever in the judgment of the Price Administrator (provided for in Section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order."

of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of the Act. In such a case he may, by regulation or order, establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of the Act. Discretion is thus lodged in the Administrator either to establish maximum prices for particular commodities or groups of commodities in furtherance of a policy of selective price control or, if it should prove necessary, to establish a ceiling over prices for all or a number of commodities at one time.[20]

The basic standards that must be satisfied under the Act in establishing maximum prices are that the prices must be generally fair and equitable[21] and must effectuate the purposes of the Act.[22] The outer contours of the term "generally fair and equitable" are not susceptible of precise definition, and its content will vary with the particular commodity. Certain questions are immediately raised: May prices be generally fair and equitable which are nevertheless too low to permit a particular producer or seller to sell the commodity profitably? The answer to the question as so stated clearly must be in the affirmative.[23] Maximum price regulations are quasi-legislative enactments of general applicability; their fairness must be general and not specific, and the Act expressly so provides.[24] But what is meant by the term "gen-

[20] In the House there was much controversy over the respective merits of the "Baruch Plan," contemplating an "over-all ceiling" covering all commodity prices, rents, interest rates, wages, salaries and profits, as of a base date, on the one hand, and of selective price control on the other. Testimony of Bernard M. Baruch, *House Hearings* 989-1045. The "Baruch Plan" was partially embodied in a series of bills introduced by Congressman Albert Gore, H. R. 5760, H. R. 5997, H. R. 6086, 77th Cong., 1st Sess. (1941), but was defeated on the floor by a vote of 218 to 63. 87 Cong. Rec., Nov. 26, 1941, at 9410. The Act is nevertheless sufficiently flexible to authorize a general ceiling technique for commodity prices (exclusive, therefore, of profits, wages and salaries, and rents in non-defense areas), should it seem appropriate to do so.

[21] The bill as introduced required that established maximum prices be generally fair and equitable to *buyers and sellers,* and effectuate the purposes of the Act. H. R. 5479, 77th Cong., 1st Sess. (1941), §2(a). The italicized language was omitted from H. R. 5990, as reported by the House Banking and Currency Committee. The omission was to make clear that the general fairness and equity of "ceilings," was not to be measured by purely private considerations.

[22] Section 1(a) provides: "It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes."

[23] "Because of the legislative nature of regulations establishing maximum prices, applying to large numbers of sellers, the bill does not guarantee a profit to each individual seller." *Senate Report* 15.

It was consistently recognized that high cost producers *might* require special treatment through a differential pricing system, in many cases accompanied by purchases pursuant to §2(e). *House Hearings* 319-320, 401-403, 467-468, 652-653. However, there is nothing in the legislative history to suggest that such a system or purchases are required merely because the maximum price is too low to permit high cost sellers to continue to sell the particular commodities at a profit.

[24] Such a result would not be open to successful challenge under the Fifth Amendment. Morrisdale

erally?" To what percentage of the sellers of a particular commodity must the regulation be fair and equitable—a majority? the bulk? 95 percent? And does the term "generally" have reference to numbers of sellers or to volume of sales?[25]

To raise these questions is but again to state that a single definitive answer is impossible. Certain frames of reference may be formulated against which the consequences of a maximum price can be measured. But a frame of reference is not a mold to which the maximum price must be shaped. Frames of reference and, indeed, the content of the term "generally fair and equitable," will change not only with the commodity but with the economic level at which price control is being exercised. To think and to speak in terms of a price that is generally fair and equitable to producers responsible for the bulk of the production may be entirely appropriate in measuring the effect of maximum prices established at the manufacturing level. Yet the concept may carry no particular meaning when, for example, the consequences of a general price ceiling over all or most prices at the retail level are being appraised in the light of the statutory standards.

Certain specific guides to what is generally fair and equitable for individual prices are indicated by Section 2(a). But these are not exclusive, and need be applied only "so far as practicable." Moreover, there is much room for judgment in the application of even those guides that are specified. This can perhaps best be illustrated by raising certain of the administrative and operating problems inherent in the application of the deceptively simple language of Section 2(a). In their essence, none of these problems is susceptible of decisive solution by the Administrator or the courts. They merely suggest the existence of several courses of action, any of which may be reasonable. Tentative administrative choices will unquestionably be reconsidered in the light and as a result of experience gained in day-to-day operations.[26]

In issuing a maximum price regulation, the Administrator is required, so far as practicable, to ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941.[27] If there were no prevailing prices for the particular

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Coal Co. v. U. S., 259 U. S. 188 (1922) (Lever Act); Highland v. Russell Car Co., 279 U. S. 253 (1929) (Lever Act); DuPont de Nemours & Co. v. Hughes, 50 F. (2d) 821 (C. C. A. 3d, 1931) (Lever Act); Hamilton v. Kentucky Distilleries Co., 251 U. S. 146 (1919) (Prohibition Act); Ruppert v. Caffey, 251 U. S. 264 (1920) (Prohibition Act); Legal Tender Cases, 12 Wall. 457, 551 (U. S. 1870). And see Tagg Bros. & Moorhead v. U. S., 29 F. (2d) 750, 755 (D. Neb. 1928), *aff'd*, 280 U. S. 420 (1930) (Packers and Stockyards Act of 1921).

[25] The Senate Report suggests an answer: The bill requires that "prices be generally fair and equitable as applied to the sellers responsible for the major part of the output of any commodity." *Senate Report* 15.

[26] The Administrator and his staff are in continuous touch with the persons affected by the regulations. These contacts are informal, through the medium of telephone calls, letters, and personal meetings, and semi-formal through reports and other information obtained under §202, and voluntarily offered. In addition, invaluable information and suggestions will be acquired from Industry Advisory Committees established in accordance with §2(a).

[27] The bill as introduced established July 29, 1941, as the base date. H. R. 5479, 77th Cong., 1st Sess. (1941), §2(a). When reported by the House Committee, the date was changed to Oct. 1, 1941. H. R. 5990, 77th Cong., 1st Sess. (1941), §2(a). The October 1-15 period was established by amendment on the floor of the House. 87 Cong. Rec., Nov. 28, 1941, at 9441-2. A minor interpretative question is presented as to the exact period meant by the words "between October 1 and October 15, 1941"; that is, whether there is intended a 13-day, 14-day, or 15-day period, and if a 14-day period, whether October 1 or October 15 is included. Although the further provision of §2(a) requiring the use of "the nearest two-week

commodity during the October 1-15 period, or if the prevailing prices during that period were not generally representative, the Administrator is required to ascertain and give due consideration to the prices prevailing during the two-week period nearest October 1-15, 1941, in which, in his judgment, the prices for the commodity were generally representative. This latter provision is of principal importance in those cases in which prices prevailing during October 1-15 were seasonal, or reflected speculative activities or abnormal market conditions, induced, for example, by a sudden flurry of Army-Navy buying.[28]

Clearly, however, the Administrator is not required to adopt the price which prevailed for the commodity during the base period as the maximum price.[29] Nor is a maximum price immune from attack simply because it is the price which prevailed during that period. So far as practicable, the Administrator is to adjust such prices for such factors as he determines to be of general applicability. Certain of these factors are indicated: speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity, during and subsequent to the year ended October 1, 1941. The effect of the price on production or supply is also important in almost every case. Many of the most difficult questions under the Act arise out of the need to make these adjustments.

In determining what adjustments to make to the October 1-15 prices, the Administrator is required to consider general increases or decreases in costs and profits of sellers during and subsequent to the year ended October 1, 1941. Whether such costs and profits have generally increased or decreased can be determined only by comparing them with costs and profits of sellers during some other period. Wisely enough, the Act does not require any particular period to be taken as the basis for comparison. In many cases profits earned during the 1936-39 period will be the best basis for comparison with profits earned during and subsequent to the year ended October 1, 1941. This is true partly because that period did not reflect defense expenditures, partly because it comprised both good and bad years under peace-time conditions, and partly because the period has been utilized for purposes of the excess profits tax.[30] Business enterprises subject to maximum price regulations accordingly have already compiled much of the necessary statistical information about operations during that period.

It has also been suggested that the first quarter of the year beginning October 1, 1940, be taken as the base period, on the ground that only by a comparison with

period" in certain cases, without more, at least suggests a 14-day interval, it seems most likely that a 15-day or half-month period was intended.

[28] The provision was also probably intended initially to protect such commodities as burley tobacco and shad, which are not marketed on October 1, and for which no prices would accordingly prevail. 87 Cong. Rec., Nov. 28, 1941, at 9470. After being reported by the Senate Banking and Currency Committee, §3(a) was amended with that in mind. 88 Cong. Rec., Jan. 10, 1942, at 233-34. Section 2(i), relating to fishery commodities, was added in conference. *Conference Report* 23.

[29] The legislative history indicates that in many cases the October 1-15 period will serve merely as a point of departure. *House Report* 5; *Senate Report* 14-15.

[30] Second Revenue Act of 1940, 54 STAT. 980, 26 U. S. C. A. §713(b) (Supp. 1941).

profits earned at the beginning of the year can it be determined whether profits have generally increased or decreased during the year. Similarly, in accordance with this suggestion, whether profits earned subsequent to the year ended October 1, 1941, generally increased or decreased would be determined by comparing such profits with profits earned during the first quarter of the year beginning October 1, 1940. Still another suggestion is that the year beginning October 1, 1939, and ending October 1, 1940, be taken as the base period; this on the ground that only by comparison with profits earned during the year just preceding the year ended October 1, 1941, can it be determined whether profits earned during that year, taken as a whole, generally increased or decreased. However, it is questionable whether either of these suggested periods is of sufficient duration to be fairly representative.

It is necessary here to do no more than emphasize that the choice of a comparative period is not a matter of statutory interpretation; it is one of fair administration. Reasons that would impel the choice of the 1936-39 period for a particular commodity might well give way in the light of considerations applicable to another commodity. The controlling test must be the reasonableness of the judgment exercised in the light of all the circumstances. No particular maximum price is the only one that is generally fair and equitable and will effectuate the purposes of the Act. There will be a range of maximum prices which satisfy these standards. The statutory requirements are met so long as the Administrator has acted in accordance with law and has not acted arbitrarily or capriciously in the light of the circumstances prevailing at the time of action. Thus, although the prices prevailing during the October 1-15 period could be adjusted downward in many cases (because such prices may allow profits greatly exceeding those earned during any selected comparative period), it may prove undesirable to do so. In the interest of stabilization, the Administrator generally has attempted to fix maximum prices at the levels which prevailed during October 1-15, 1941. Severe dislocations might otherwise be caused. But once prices are established at these levels, they may well be maintained in the face of cost increases unless it can be shown that profits no longer compare favorably with profits earned during the period chosen for comparative purposes.

There is still another problem inherent in the use of the seller's profits as one measure of the general fairness and equitableness of a maximum price regulation. What is meant by "profits?"[31] Is the Administrator limited in his consideration of profits to those earned upon the particular commodity under regulation, or may he consider the profits of the seller from its over-all operation? The question is particularly acute in industries a part of whose facilities are being converted to war-time production. As conversion accelerates, the per-unit cost of the commodities produced by the seller for civilian consumption will necessarily increase, although the over-all profitability of the seller may likewise increase. Joint-cost products are

[31] There should at least be general agreement that by "profits" it is meant "profits before income and excess profits taxes." No system of price control can operate successfully if the fairness of the prices established under it is to be tested by a comparison of profits after war-time taxes with profits after peace-time taxes.

found in many important industries.[32] Allocation of costs among such products is largely a matter of arbitrary accounting convention, the validity of which is not demonstrable.[33] The same, to a lesser degree, is probably true of the allocation of indirect expenses to a particular commodity, by a company making many commodities.[34] Efforts by the Administrator, in such instances, to allocate costs to particular commodities produced by the same seller would result only in interminable investigations and delay and would, in many cases, go far beyond what sellers themselves have regarded as necessary in the operation of their own businesses.

Section 2(a) requires that a maximum price regulation (other than a temporary regulation) be accompanied by a statement of the considerations involved in its issuance. The Act establishes no particular form and requires no particular content for such a statement. It is intended primarily to enable persons subject to a maximum price regulation to know the basis upon which the Office of Price Administration has acted in the issuance of a maximum price regulation. In many cases evidential material will doubtless be included. Persons protesting the maximum price regulation will thus be enabled to narrow the issues raised by their protest.[35] In addition, such statements will provide a basis for the public evaluation of the work of the Office of Price Administration. It may be anticipated that there will be a gradual evolution in the form and content of these statements as their functions become more clearly defined.

Section 2(a) also permits the issuance of temporary maximum price regulations, effective for no more than 60 days, which may freeze the prices prevailing for any commodity within five days prior to the date of the issuance of the regulation. In general, regulations of this kind are designed to permit the Administrator to meet emergency situations speedily. Hence, the standards applicable to maximum price regulations of indefinite duration are inapplicable here; nor need such temporary regulations be accompanied by statements of considerations.[36] The danger in the five-day limitation is that prices may be raised before the five-day period in anticipation of the action taken. Often it requires several days to determine the impact of a price regulation before it is issued; in many cases it may be desirable to consult with

[32] *E.g.*, chemicals, meat packing, petroleum. Thus, acetic acid, wood alcohol, and charcoal are joint-cost products derived from wood; acetone and butyl alcohol are joint-cost products derived from molasses or corn; glycerine and soap are joint-cost products derived from fats and oils.

[33] "No accountant has been able to devise a method yielding by-product or joint-cost figures which does not embody a dominance of arbitrariness and guesswork." Hamilton, *Cost as a Standard for Price* (1937) 4 LAW & CONTEMP. PROB., 321, 328.

[34] The Supreme Court has recently held that the accounting system of a taxpayer "though useful or necessary as a business aid, may not fit the different requirements when a State seeks to tax values created by business within its borders." Butler Bros. v. McColgan, 62 Sup. Ct. 701, 704, decided March 2, 1942.

[35] "This statement will afford those subject to a maximum price regulation an adequate opportunity to know the basis for its adoption and, therefore, intelligently to formulate, in the form of protests as provided in section 203(a) of the bill, any objections which they may have to such regulation." *Senate Report* 15. The problems involved in protests, appeals and judicial review are dealt with separately elsewhere in this issue. See Nathanson, *The Emergency Price Control Act of 1942: Administrative Procedure and Judicial Review, infra* at 60.

[36] "Such regulations may be issued without regard to the standards set forth in the bill for the issuance of permanent regulations and without an accompanying statement of considerations." *Senate Report* 15.

representative sellers. The trade, therefore, frequently learns of the proposal while it is still in the discussion stage—and on the basis of trade rumor raise prices unjustifiably. Under such circumstances, it may be expected that OPA will issue permanent regulations reducing the lawful maximum below the speculative price, and will establish maximum prices in accordance with the other standards of the Act. One of the first operating questions presented to the Office under this section was whether a temporary regulation may establish as a maximum price the price prevailing on any one of the five days prior to the issuance of the regulation. Although the legislative history is silent on this precise point, such a result would seem to be fully consistent with the language of the provision and the underlying practical considerations.[37]

Something has already been said about the need for differing administrative techniques, and for flexibility in the issuance of maximum price regulations affecting different commodities. Considerations that would be controlling when establishing maximum prices for copper at the manufacturing level may be of no moment when establishing maximum prices for automobiles at the retail level. There is a like necessity for flexibility in the treatment of persons subject to a single price regulation. This flexibility is afforded by Section 2(c), which provides that any regulation or order may be established in such form and manner, may contain such classifications and differentials, and may provide for such adjustments and reasonable exceptions as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of the Act. This section should be read in conjunction with Section 302(i), which permits still further flexibility by providing that maximum prices may be formulated, as the case may be, in terms of prices, margins, commissions, fees, and other charges and allowances. Section 2(c) thus contemplates, for example, that the regulation establishing a maximum price may provide for premiums or discounts from an established maximum price, depending on the quantity of the commodity purchased or sold, or on other conditions of sale, such as credit terms. Similarly, differentials may be established for different kinds, grades, or quantities of commodities. Maximum prices may be fixed in terms of delivered prices or of f.o.b. prices, or of a basing point system.[38]

Section 2(a) requires that maximum price regulations or orders of indefinite duration must be of general applicability and effect. Accordingly, provision for exceptions will be formulated in general terms in a Section 2(a) regulation. Application of the general class exception to particular persons will be sought by a petition for exception or adjustment requesting that such persons be excepted in accordance with the terms

[37] Initially, the prices were to be those prevailing "on the date of issuance." 88 Cong. Rec., Jan. 10, 1942, at 249. The change was to permit the collection of the necessary information. The prices may be those prevailing either generally or in the individual establishment. *Senate Report* 15.

[38] "Sec. 2(c) of the bill provides for flexibility in the establishment of maximum price and rent, and other, regulations under the bill. It authorizes classifications, differentiations, adjustments, and reasonable exceptions which in the judgment of the Administration are necessary or proper to effectuate the purposes of the bill. For example, classifications and differentiations may be made in terms of quantity, quality, or character of the use contemplated by the purchaser, or in terms of delivered prices on the one hand and f.o.b. prices on the other, or other conditions of sale." *Senate Report* 17.

of the general rule.[39] If no such general class is established in the maximum price regulation at the time of its issuance, petitions for amendment may be filed seeking to have such a general exception established.[40] If a petition for amendment is granted, an order will presumably be issued under Section 2(c), placing the petitioner within the general class. Thus, there is opportunity for the Administrator to make special provision for cases of hardship and for high-cost producers whose continued production is necessary to the war effort. The exception for high-cost producers may permit the sale at a higher than established maximum price to the Administrator or some other Government agency, or on the open market.

It is, of course, impossible to anticipate the many situations which will require special treatment under Section 2(c). It provides a ready technique, however, for the adaptation of general rules to an almost infinite number of possible variations.

III. Quality Deterioration, Speculative and Manipulative Practices, and Hoarding

Substantial price rises may occur in reality although maximum price regulations are issued under Section 2(a) and, as a result, the selling price apparently remains constant. True stability in prices requires that the relationship between the amount paid and the value received be maintained. Success in controlling what the purchaser pays without holding relatively constant the quality he receives is of limited value as an anti-inflationary device.

But there is no blinking the fact that some degradation of quality is almost bound to result. Nor is there very much that can be done about it, so long as the deterioration does not go so far as to limit or destroy utility. Because consumers tend to resist such concealed price rises, because some manufacturers take a pride in their product and are willing to absorb cost increases rather than impair quality, and because in the fields where deterioration is most likely to occur, operations are both profitable and competitive, the problem has so far given OPA relatively little concern. Nevertheless, power to combat this quality deterioration is essential to any price control program. It is provided by Sections 2(g)[41] and 2(d).[42] These sections make express the authority otherwise necessarily implied in Section 2(a) to regulate the manipulation of form or quality.[43]

[39] Rules 38-41, OPA Procedural Regulation No. 1, 7 FED. REG. 971 (1942).

[40] Rules 35-37, *loc. cit.*, *supra* note 39.

[41] "Regulations, orders and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof." §2(g).

General procedural regulations are issued under §201(d): "The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act."

[42] "Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices (including practices relating to changes in form or quality) or hoarding, in connection with any commodity, and speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of the possession) in connection with any defense-area housing accommodations, which in his judgment are equivalent to or are likely to result in price or rent increases, as the case may be, inconsistent with the purposes of this Act." §2(d).

[43] *Senate Report* 17: "In order to achieve effective price control it may often be necessary to regulate

In establishing specifications for any commodity covered by a maximum price regulation, perfection is impossible except perhaps in the case of some basic raw materials having only a few grades. The more complicated the commodity, the more detailed the specification must be. Specification in the generic terms of everyday life, such as a "shirt" or an "ice box" is insufficient. Whether any ordinary or even extraordinary price controller can anticipate or provide detailed specifications for all possible constructions of the commodities in common use is doubtful. However, requiring that anything less than the highest grade must be sold at the price for the next grade established in the price regulation, tends to eliminate production of intermediate grades. Minute distinctions in definition can thus be avoided. The wider the gap between the top grade and the next grade adopted by the price regulation, the easier for the purchaser to appraise the commodity offered for sale in the light of the price and quality requirements, and the more effective the price control.

Discouraging the production of numerous kinds and grades not only conserves supply but is effective to prevent evasion of price control. For multiplication of types and kinds of commodities confuses the buyer so that he is unable to differentiate between the quality of the different products. This tends to render price control ineffective.[44] An incidental effect of standardization and simplification will be substantial savings to the seller—savings which are likely to play an important part in the maintenance of reasonable prices to the consumer. The vital role of standardization and simplification in the price control program has not yet been generally recognized.

There are other practices which can be utilized to evade price regulation while complying with the price and quality regulations. For example, requiring combination purchases, unnecessary multiplication of middlemen, and unreasonable trade allowances all result in the consumer spending more to obtain the desired article. Special regulations under Section 2(d) and provisions in price regulations under Section 2(g) will be effective to regulate or prohibit such practices.[45]

While not producing any specific additional return for the sale of a commodity under price regulation, certain speculative and hoarding practices produce an unnecessary and unhealthy strain on the limited supply of goods available for civilian consumption, and hence threaten price increases in commodities not under control and put artificial burdens on the enforcement of existing maximum price regulations. Section 2(d) permits OPA to regulate or restrict such activities as forward buying (indicated, for example, by comparison of purchases to current deliveries) based on expected price rises, which tends to exaggerate the demand side of the supply-demand equation, or hoarding (indicated, for example, by excessive inventories, or the relation

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or prohibit practices which are equivalent to concealed price or rent increases. . . . Examples of such practices in connection with a commodity include manipulation of the form or quality so that the same price is charged for an inferior or less desirable product (which amounts to a price increase). . . ."

[44] The maximum prices fixed for each grade must, of course, present equal attraction for the manufacturer, or production of less profitable grades ceases. To protect the consumer, the standards set must also insure a useful product.

[45] The Senate Report refers expressly to these three practices at p. 17.

between the rate of acceptance of new orders and current deliveries) which artificially diminishes the supply available to meet present demands. Control of these unnecessary shortage situations is essential. It can be accomplished by preventing unjustifiable accumulations of commodities. Section 4(d)[46] only prohibits OPA from requiring sales of stocks already on hand.

The statute is careful to see that these broad powers over industry practices shall be used only for price control purposes. Section 2(h)[47] protects industry against requirements as to changes in established business practices, cost practices, or means or aids to distribution "except to prevent circumvention or evasion" of OPA action "under this Act."[48]

IV. AGRICULTURAL COMMODITIES

No provision of the Emergency Price Control Act of 1942 provoked more bitter controversy than Section 3 relating to agricultural commodities. This was inevitable. With approximately 50 million people living on farms and 130 million people in the United States dependent on agricultural commodities for their food, clothing, and thousands of indispensable derivative commodities and by-products, the stakes to the farmer, to the consumer, and, above all, to the war effort and the nation, were incalculable. The fact that the farmers are well organized ensured a thorough hearing for the farm viewpoint in the legislature and throughout the country. Fairly to resolve the conflicting interests without sacrifice to the overwhelming public interest

[46] "Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent." §4(d).

[47] "The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act." §2(h).

[48] This provision was inserted by the House Committee, H. R. 5990, 77th Cong., 1st Sess. (1941), §2(g), eliminated by the Senate Committee as unnecessary, H. R. 5990, 77th Cong., 2d Sess. (Jan. 2, 1942), and restored on the floor of the Senate, H. R. 5990, 77th Cong., 2d Sess. (Jan. 12, 1942), §2(h). Originally aimed at protecting advertising, *House Report* 7, the present broader language (the Senate Committee rejected a substitute section limited to advertising—see statement by Senator Taft, 88 Cong. Rec., Jan. 8, 1942, at 105) does not interfere with OPA regulations necessary to prevent evasion of the price control program. Senator Vandenberg pointed out the narrow effect of subsection (h) in the Senate debate on the bill: "The exemption of which I speak does not apply if the Administrator finds that these practices are being used to circumvent or evade any ceiling established in the bill. In other words, there is an effort to draw a distinct line between a traditional, standard, appropriate, habitual business practice and one which might be invoked for the purpose of trying to evade this new control." *Id.* at 108.

Senator Taft added: "Let me add, also, that I do not think the provision would prevent the Administrator from ruling out a practice adopted by a particular firm even if it had indulged in it before. It says: 'Practices . . . established in any industry.'

"I should think the provision probably applied only to an industry-wide practice which the Administrator could not change."

Hoarding, speculative forward buying, and manipulations of form and quality are certainly not established in any industry.

Section 2(e) restricts the Administrator from prohibiting trading under the Commodity Exchange Act in agricultural commodities for future delivery. Senator Butler pointed out on the floor of the Senate that this provision: ". . . does not interfere with any ceilings the Price Administrator may set, nor does it take away the power of the Price Administrator to set ceilings or to make such other regulations of market practices as he finds necessary. In other words, all futures trading, supervised by the Commodity Exchange Administration, must of necessity be subject to the maximum prices published by the Administrator." 88 Cong. Rec., Jan. 10, 1942, at 245.

and necessity, called for Congressional statesmanship of the highest order. The extent to which the Congress met or failed its responsibilities has yet to be determined.[49]

Section 3 of the Act carves from the basic grant of power to the Administrator, a special limitation for agricultural commodities.[50] Section 3(a) prohibits the Administrator from establishing or maintaining maximum prices for agricultural commodities below the highest of four possible prices, as determined and published by the Secretary of Agriculture: (1) 110% of the parity price, or comparable price, for such

[49] Properly to evaluate the issues requires an understanding of the economic, social, and political ramifications of one of the most difficult domestic economic problems of our times. For more than 20 years, it is alleged, there has been a relative disadvantage to farmers between the prices paid by them for commodities bought and the prices received by them for commodities sold. Even prior to 1929, farm income had failed to keep pace with the increase in national income. During the peak of "boom" prosperity, farm products could be exchanged for only 90% as much of other products, on the average, as they could have been exchanged for in the period before the war. By February 1933, the exchange value of farm products for industrial goods had fallen to 50% of the pre-war average. The exchange value of such products for services such as labor, taxes, and credit was even less. Returns per acre for 1932-33 were about 60% less than in the pre-war years, while average mortgage debt per acre was nearly three times, and taxes twice, as high. EZEKIEL AND BEAN, ECONOMIC BASES FOR THE AGRICULTURAL ADJUSTMENT ACT (1933). Through a far-reaching, comprehensive program of agricultural legislation, the Congress has sought to restore the relative purchasing power of the farmer. See, *e.g.*, Agricultural Adjustment Act of 1933, 48 STAT. 31, 7 U. S. C. A. §601; Agricultural Adjustment Act of 1938, 52 STAT. 31, 7 U. S. C. A. §1281; Federal Crop Insurance Act of 1938, 52 STAT. 72, 7 U. S. C. A. §1502; Soil Conservation and Domestic Allotment Act of 1935, 49 STAT. 163, 16 U. S. C. A. §590(a); Sugar Act of 1937, 50 STAT. 903, 7 U. S. C. A. §1101, as am'd by Pub. L. No. 386, 77th Cong., 1st Sess. (Dec. 26, 1941); Agricultural Marketing Agreement Act of 1937, 50 STAT. 248, 7 U. S. C. A. §671; various appropriation acts for parity payments, 53 STAT. 974 (1939); 54 STAT. 561 (1940); Pub. L. Nos. 144 and 147, 77th Cong., 1st Sess. (July 1, 1941).

[50] "SEC. 3. (a) No maximum price shall be established or maintained for any agricultural commodity below the highest of any of the following prices, as determined and published by the Secretary of Agriculture: (1) 110 per centum of the parity price for such commodity, adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials, or, in case a comparable price has been determined for such commodity under subsection (b), 110 per centum of such comparable price, adjusted in the same manner, in lieu of 110 per centum of the parity price so adjusted; (2) the market price prevailing for such commodity on October 1, 1941; (3) the market price prevailing for such commodity on December 15, 1941; or (4) the average price for such commodity during the period July 1, 1919, to June 30, 1929.

"(b) For the purposes of this Act, parity prices shall be determined and published by the Secretary of Agriculture as authorized by law. In the case of any agricultural commodity other than the basic crops corn, wheat, cotton, rice, tobacco, and peanuts, the Secretary shall determine and publish a comparable price whenever he finds, after investigation and public hearing, that the production and consumption of such commodity has so changed in extent or character since the base period as to result in a price out of line with parity prices for basic commodities.

"(c) No maximum price shall be established or maintained for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to producers of such agricultural commodity a price for such agricultural commodity equal to the highest price therefor specified in subsection (a).

"(d) Nothing contained in this Act shall be construed to modify, repeal, supersede, or affect the provisions of the Agricultural Marketing Agreement Act of 1937, as amended, or to invalidate any marketing agreement, license, or order, or any provision thereof or amendment thereto, heretofore or hereafter made or issued under the provisions of such Act.

"(e) Notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any other person with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture; except that the Administrator may take such action as may be necessary under section 202 and section 205(a) and (b) to enforce compliance with any regulation, order, price schedule or other requirement with respect to an agricultural commodity which has been previously approved by the Secretary of Agriculture.

"(f) No provision of this Act or of any existing law shall be construed to authorize any action contrary to the provisions and purposes of this section."

commodity, adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials; (2) the market price prevailing for such commodity on October 1, 1941; (3) the market price prevailing for such commodity on December 15, 1941; or (4) the average price for such commodity during the period July 1, 1919 to June 30, 1929. Of the four statutory minima, only two (the 110% of parity provision and the 1919-1929 average) require special comment.[51] Of the four, parity (and comparable prices where applicable) is the only variable; the others are fixed prices. Generally speaking, the parity concept seeks to return to the farmer an income on the sale of his commodities sufficient to enable him to buy the same amount of non-farm products as he was able to buy in some base period, which in most cases is the 1909-14 period.[52] With Government expenditures approaching 6 billion dollars a month, it may be anticipated that parity prices will gradually increase until they become the controlling standard.

Farm representatives selected 110% of parity, as distinguished from parity itself, as most likely to return to the producer a season's average of parity prices. This provision was a part of the bill from its inception and is justified by farm representatives on the ground that it provides the producers with an adequate opportunity to realize the parity goal. Agricultural prices fluctuate widely within a season, from season to season, and from year to year. It is argued that unless agricultural prices are occasionally permitted to rise above parity, the season's average would invariably be below parity.[53]

Of course, 110% of parity permits a substantial increase in the prevailing prices for most agricultural commodities. For example, the price of wheat on March 15 was $1.05 per bushel; 110% of parity on that date was $1.44. The market price of corn on March 15 was 78.4 cents per bushel; 110% of parity was $1.04 per bushel.

[51] The bill as reported by the House Committee contained the Oct. 1, 1941 minimum. Cottonseed oil reached a peak level on that date. This was retained without change.

The Dec. 15, 1941, alternative was a part of the O'Mahoney Amendment, 88 Cong. Rec., Jan. 9, 1942, at 194, and was retained by the conferees after the Senate conferees receded with respect to the O'Mahoney Amendment. Its purpose was allegedly the protection of such crops as burley tobacco, for which no market existed on Oct. 1, 1941. It incidentally provides the highest prices for beef, veal, and wool. *Id.*, Jan. 27, 1942, at 720.

[52] Parity price is defined in the Agricultural Adjustment Act of 1938, 52 STAT. 202, 7 U. S. C. A. §1301(a)(1), as follows: "(1) 'Parity,' as applied to prices for any agricultural commodity, shall be that price for the commodity which will give to the commodity a purchasing power with respect to articles that farmers buy equivalent to the purchasing power of such commodity in the base period; and, in the case of all commodities for which the base period is the period August 1909 to July 1914, which will also reflect current interest payments per acre on farm indebtedness secured by real estate, tax payments per acre on farm real estate, and freight rates, as contrasted with such interest payments, tax payments, and freight rates during the base period. The base period in the case of all agricultural commodities except tobacco shall be the period August 1909 to July 1914, and, in the case of tobacco, shall be the period August 1919 to July 1929."

Comparable price is nowhere defined. The concept originates in the Act of July 1, 1941, Pub. L. No. 147, 77th Cong., 1st Sess., §4(a). Comparable prices are now published for peanuts (for oil), soybeans, and peas. *Midmonth Local Market Price Report*, Feb. 27, 1942, p. 16.

For the best available discussion of parity, see testimony of Howard R. Tolley, Chief of the Bureau of Agricultural Economics, Department of Agriculture, before a subcommittee of the Senate Committee on Agriculture and Forestry, *Hearings pursuant to S. Res. 117*, 77th Cong., 1st Sess. (1941) pt. 2, pp. 303-374.

[53] *Senate Report* 13.

Cotton was 18.06 cents per pound on March 15; 110% of parity was 20.19 cents.[54] As this country is called upon to satisfy an ever-increasing demand by the United Nations for foodstuffs and other agricultural products, price advances are not likely to be prevented by any excesses of supply on hand or in prospect. Because of this fact, 110% of parity is likely to become a formidable spiraling force, exerting upward pressure on the general level of prices.

The 1919-1929 average first made its appearance in the bill as reported by the House Banking and Currency Committee.[55] It received immediate and widespread criticism and the Senate Banking and Currency Committee, refusing to report it, characterized it as "unreasonable and inflationary."[56] To cotton it means a limitation of 21.47 cents per pound. In some instances it permits returns to producers of as much as 130% of parity. Nevertheless, it has become a part of the Act.[57]

Section 3(c) prohibits the Administrator from establishing or maintaining maximum prices for commodities processed or manufactured in whole or substantial part from any agricultural commodity below a price that will return to the producers of such agricultural commodities an amount equal to the highest price set forth in Section 3(a). The provision of course is not designed to prevent price action with respect to any particular derivative commodity. It is only intended to prevent the avoidance of the provisions of Section 3(a).[58] Moreover, it is the producer with whom the Congress is concerned, not the processor or manufacturer. Otherwise put, subject to the standards of Section 2(a), the Administrator may establish maximum prices with respect to those derivative commodities which for one reason or another are vital to the war effort, and withhold action from less vital commodities derived from the same agricultural commodity—so long as the particular action taken does not force the total return to producers of the agricultural commodity below the limitations of Section 3(a).

In appraising the breadth of the limitation imposed by Section 3 upon the Administrator's powers,[59] the first inquiry must necessarily be directed to the scope of

[54] *Midmonth Local Market Price Report*, Feb. 27, 1942. For the increase in both prices and parity since the passage of the bill, compare figures in text with those presented to the Senate. 88 Cong. Rec., Jan. 27, 1942, at 720. All of the price figures are given exclusive of Government parity, soil conservation, and other payments. In determining to what extent prices might rise before the Administrator can take action, such Government payments as are applicable should be subtracted from the figure representing 110% of parity.

[55] *House Report* 7. For a tabular presentation of the comparative effect of §3(a), as of Dec. 15, 1941, see 88 Cong. Rec., Jan. 27, 1942, at 720.

[56] *Senate Report* 13.

[57] The O'Mahoney Amendment, which would have permitted prices equivalent to 121% of parity, 88 Cong. Rec., Jan. 10, 1942, at 225, 235, was itself amended at the instance of Senator Russell to include the 1919-1929 average. *Id.* at 232. Although the Senate conferees receded from the O'Mahoney Amendment, the Conference Committee retained the 1919-1929 average. *Conference Report* 21-23.

[58] *Senate Report* 19: "Section 3(c) and section 3(d) insure that the powers granted to the Administrator by the bill or other powers granted under existing law, will not be so exercised as to vitiate the policy expressed in this section."

[59] As a part of the Conference Report rendered by Senator Brown, he said: "Some question has been raised regarding the applicability of the limitations of section 3(a) to imported commodities. Of course, these limitations have to do only with domestic commodities, so that items such as coffee, cocoa, etc., are not subject to these limitations." 88 Cong. Rec., Jan. 27, 1942, at 724.

the term "agricultural commodities." Nowhere in the Act is it defined.[60] Both intrinsic and extrinsic aids to construction establish that processed or manufactured commodities are not included within the term. If they were they would fall within the protection of Section 3(a), and Section 3(c) would be superfluous. As introduced in the House, the bill contained no references to processed commodities.[61] Section 3(c) of H. R. 5990, as reported by the House Banking and Currency Committee, dealt with processed commodities, as did all subsequent versions of the bill. There is nothing uncertain about the purpose of the addition. It was felt that the term "agricultural commodities" did not encompass processed or manufactured commodities, and that maximum prices might be established for processed or manufactured commodities which would permit the Administrator to do by indirection what Section 3(a) prevented him from doing directly.[62]

The legislative history of Section 3(c), the so-called Bankhead Amendment, makes certain that processed or manufactured commodities are not included within the term "agricultural commodities." As introduced by Senator Bankhead, the amendment initially read as follows:[63]

> Notwithstanding any other provision of law, no action shall be taken by the Administrator or any other person with respect to any agricultural commodity *or commodity processed or manufactured in whole or substantial part from any agricultural commodity* without the prior approval of the Secretary of Agriculture. (Italics supplied)

On January 9, Senator Bankhead modified the amendment by striking the italicized words. As so modified, after two days of stormy debate, the amendment was agreed to.[64] Senator Brown, Floor Manager for the bill, stated that the modification of the Bankhead Amendment was intended greatly to reduce the number of products

[60] The term "commodity" is defined in §302(c). If this definition is equally applicable to the term "agricultural commodity," it would appear that §3 is applicable to articles, products, materials, and services. For the reasons given in the text, it seems clear that the broad definition of "commodity" contained in §302(c) does not apply to the term "agricultural commodity," used in §3.

[61] H. R. 5479, 77th Cong., 1st Sess. (1941).

[62] At p. 2073 of the House Hearings, the following exchange took place between Chairman Steagall and Secretary Wickard:

"The Chairman: Would this be true—and I am not speaking of cotton alone, but of other commodities —that it would not be necessary to fix a ceiling at parity to beat down the price of the commodity below parity, or could that be done by discriminatory ceilings placed upon the processed goods?

"Secretary Wickard: I think, of course, that you could nullify it in that way.

"The Chairman: So that, if we want to make sure that the parity provision in this bill is carried out, we will have to put some provision in the bill that will insure it?"

And see the statement of Edward O'Neal, President of the American Farm Bureau Federation, *House Hearings* 1394.

[63] 88 Cong. Rec., Jan. 5, 1942, at 5; *Id.*, Jan. 9, 1942, at 165, 177.

[64] *Id.* at 193-194. The Bankhead Amendment is undoubtedly open to criticism as contrary to fundamental principles of good administration. Giving to the heads of two executive departments concurrent jurisdiction over the same subject matter would seem to lead only to a division of responsibility and to placing the burden of determining disputes upon an already overworked Chief Executive. The President advised the Senate of his disapproval. *Id.*, Jan. 8, 1942, at 115. Moreover, it has been forcefully argued that the Department of Agriculture is essentially a representative of the producers rather than of the consumers, and that an undesirable conflict of interest might result. As a practical matter, however, the Bankhead Amendment is perhaps no more than declaratory of the close cooperation that would inevitably have become established practice.

which could be affected by the amendment.[65] And Senator Bankhead, himself, stated that after the modification the term "agricultural commodities" was coextensive with the term as used in Section 3(a).[66]

In the light of the Act and its legislative history, therefore, the most reasonable construction of the term "agricultural commodity," is that it is restricted to raw agricultural commodities as distinguished from processed or manufactured commodities.[67]

Neither Section 3(a) nor Section 3(c) indicates whether the statutory standards are inclusive or exclusive of Government payments to the producer.[68] During the hearings, questions were frequently asked bearing upon the effect of price ceilings already established upon parity prices.[69] Witnesses representing the Department of Agriculture, as well as farm organizations, testified upon the same subject.[70] In all such discussions it was customary to include Government payments in calculating the effect of existing ceilings theretofore imposed by the Administrator, and in determining the procedure to be followed by the Administrator after the bill under consideration had become law.[71]

On August 13, 1941, for example, the Administrator issued Price Schedule No. 16, establishing a ceiling of 3.50 cents per pound on raw sugar, duty paid New York.[72] After questioning by Mr. Crawford of Michigan, as to whether such a ceiling would yield parity for the sugar beet growers, Mr. Henderson inserted a computation in the record showing that the then parity price per ton of sugar beets was $7.15. He pointed out that under the ceiling price, $5.30 per ton of sugar beets would be paid

[65] 88 Cong. Rec., Jan. 9, 1942, at 177. [66] See note 63, *supra*.

[67] This conforms to the express statements of Senator McNary, Minority Floor Leader, and Senator Overton. 88 Cong. Rec., Jan. 9, 1942, at 177, 187. There will be close cases that may produce exceptions to the general rule. Senators Bankhead and Overton disagreed over whether butter was an agricultural commodity. *Id.* at 177. Gum turpentine and resin may be agricultural commodities; wood turpentine and resin are more questionable. 36 OPS. ATTY. GEN. 326 (1930); 12 U. S. C. A. §1141(J)(g). These and other similar situations must be left for agreement between OPA and the Department of Agriculture.

[68] Soil conservation payments have been made with respect to cotton, corn, wheat, potatoes, peanuts, rice, and tobacco.

Parity payments have been made with respect to cotton, corn, wheat, rice, and tobacco. In making parity payments, the Secretary has added soil conservation payments to prices received from the commodity, for comparative purposes with parity. Pub. L. No. 144, 77th Cong., 1st Sess. (July 1, 1941), which appropriates funds for parity payments, incorporates this practice.

Conditional payments have been made with respect to sugar beets and sugar cane.

[69] For example, during the House Hearings, Mr. Boggs of Louisiana made the following statement: "While the Committee was in recess I checked with the Department of Agriculture figures and discovered that parity is $4.83, and that this price of $3.50 *plus 90 cents, the Government payment,* is equivalent to $4.40, which is about 10 percent below parity." (Italics supplied) *House Hearings* 515.

And again, at p. 937, Mr. Boggs said: "Now at a 3½ cent price for raw sugar, the grower receives from the processor $3.50 per ton of sugarcane, *to which must be added 90 cents conditional payment,* which totals $4.40. Four dollars and forty cents is 87 percent of the $5.03 parity." (Italics supplied)

See also prepared statement and tabular material of Mr. Crawford of Michigan, a member of the House Banking and Currency Committee, *House Hearings* 724-726. The same principle is applicable equally to the other standards of §3(a).

[70] Howard R. Tolley, *House Hearings* 2134; Dudley Smith, *id.* 2142; Mr. Holman, Sec'y, National Cooperative Milk Producers Federation of Washington, D. C., *Senate Hearings* 363.

[71] See notes 69, 70, *supra*. And see also *House Hearings* 2140, 2143-44; tabular material, 88 Cong. Rec., Jan. 27, 1942, at 737.

[72] 6 FED. REG. 4063 (1941).

to producers by processors. Adding the Government payment of $1.90 per average ton of sugar beets to the sum of $5.30 per ton received by the producer, would result in a total return to the producer of $7.20 per ton. This, Mr. Henderson stated, hit parity "almost on the nose."[73] The result, moreover, is obviously consistent with the recognition of farm leaders that "parity income is more important than parity unit prices."[74]

Another important interpretative problem is involved in the sale by the Commodity Credit Corporation of large stocks of certain agricultural commodities acquired as part of the agricultural program.[75] In the normal course of events the Commodity Credit Corporation would release its stores of agricultural commodities as scarcity conditions, with accompanying inflationary prices, became imminent. Parity return to the producer would ordinarily be the Corporation's standard. This was Secretary Wickard's expressed position, at least as early as August 1941.[76]

Subsequent to the passage of the Act, the Secretary gave recognition to this principle and stated that the stocks of the Commodity Credit Corporation would be sold when appropriate to prevent prices of agricultural commodities from rising above parity. It was his view that if the price of feedstuffs were allowed to rise substantially, the production of meats would diminish, and the retail price of meats produced would rise to such levels as to give further impetus to an already sharply rising cost of living. The question immediately presented was whether such sales would be inconsistent with Section 3 of the Emergency Price Control Act.[77]

Objective study of the Act and its legislative history leads to the conclusion that nothing in it is inconsistent with the sale of commodities by the Commodity Credit Corporation at prices below those set forth in Section 3(a). Those who hold a contrary opinion must place their principal reliance on Section 3(f). This section is as follows:[78]

(f) No provision of this Act or of any existing law shall be construed to authorize any action contrary to the provisions and purposes of this section.

[73] *House Hearings* 509.

[74] Statement of Senator Bankhead, *Senate Hearings* 555.

[75] Commodity Credit Corporation was established in 1933 under Executive Order No. 6340 and was subsequently incorporated under the laws of the State of Delaware. As of Dec. 31, 1941, it owned substantial amounts of barley, corn, cotton, rubber, rye, tobacco, wheat, dairy products, and certain miscellaneous commodities.

[76] "Secretary Wickard: Now, let me say that Commodity Credit should handle the stocks it has acquired in a way that will not beat down farm prices and income. I feel that Commodity Credit should never release its stocks for any commodity in a way that would endanger the parity objective for that commodity. But to tie up stocks in an effort to create an artificial scarcity and unreasonable prices is not in the interests of the farmer, the consumer, or the general welfare. . . .

"The proposed freezing of stocks violates the principle of the ever normal granary. The theory behind the granary is that commodities will be stored up in times of surplus and released when they are needed." *House Hearings* 480.

[77] At least some senators stated that they believed such action was contrary to §3. 88 Cong. Rec., Feb. 2, 1942, at 939.

[78] This section is identical with §3(d) of H. R. 5990 as reported by the House Committee. It remained unchanged thereafter.

To begin with, this section should be contrasted with Section 2(f) which is directed particularly at commodities purchased and sold under the authority of Section 2(e) of the Act. Section 2(f), *inter alia,* is as follows:

2(f) . . . and no agricultural commodity shall be sold within the United States *pursuant to the provisions of this section* by any governmental agency at a price below the price limitations imposed by section 3(a) of this Act with respect to such commodity. (Italics supplied)

Clearly the Congress well knew how to restrict the sale of commodities when it saw fit to do so. Moreover, Section 2(e) expressed the plain intent to leave the Agricultural Adjustment Act of 1938, as amended, untouched and unaffected.[79]

The House Conference Committee Report interprets Section 3(f) to contain, with respect to the sales of agricultural commodities by other governmental agencies under other provisions of law, the same limitation as Section 2(e).[80] Nothing in the legislative history of Section 3(f), and no intrinsic evidence in the Act, lends support to such a construction. Indeed, all of the evidence is to the contrary.

The ambiguity created by this interpretation of Section 3(f) was effectively put to rest by two subsequent pieces of legislative history. In delivering the Conference Report to the Senate, Senator Brown discussed the question specifically:[81]

. . . On the subject to which the Senator from Vermont (Mr. Austin) addressed himself, the issue was presented to the conferees. The question was this: Shall we prohibit existing agencies of the Government, such as the Commodity Credit Corporation, from selling agricultural commodities at prices below the price maximums fixed in Section 3 of the bill? We decided to decline to do so. We declined to permit the restriction on existing agencies. That was the amendment in which the Senator from Illinois (Mr. Lucas) was interested, and which he considered submitting to the Senate. It was pointed out that the President had vetoed a bill containing that provision, and that the Secretary of Agriculture was very much opposed to it. Therefore, so far as the general powers in the bill are concerned, we do not in any way restrict the Commodity Credit Corporation or any similar Government agency.

The language on page 21 of the House Conference report might be misconstrued if I did not make this statement. Section 3 does not in any way affect prices of commodities now in existence and owned by these agencies.

After referring to the comment in the House Conference Report,[82] the report of Senator Brown continued as follows:[83]

[79] Section 2(e) is in part as follows: ". . . and nothing in this section, or in any existing law, shall be construed to authorize any sale or other disposition of any agricultural commodity contrary to the provisions of the Agricultural Adjustment Act of 1938, as amended. . . ."

This language was contained in H. R. 5990 as reported by the Senate Committee. With respect to that language, that Committee said, *Senate Report* 11: "The bill expressly provides that the policy laid down by the Congress with respect to agricultural commodities remains paramount to any authority conferred by the Emergency Price Control Act of 1942. The committee bill does not and cannot be construed to limit, expand, or later the existing powers and policies of the agencies charged with the administration of the Agricultural Adjustment Act of 1938, as amended. They remain exactly as presently constituted."

[80] *House Report* 20-21.

[81] 88 Cong. Rec., Jan. 27, 1942, at 721. Under Senate Rules, no conference report is printed. The oral report of the floor manager constitutes the conference report to that body.

[82] *Supra* note 80.

[83] 88 Cong. Rec., Jan. 27, 1942, at 722. The statement of Senator Brown on this subject is extensive and well worth close study. *Id.* at 721-722.

I desire to point out to the Senate that this inadvertent statement is not to be taken as a correct interpretation of Section 3(f) of the Conference agreement.

At the time of the approval of the Emergency Price Control Act by the President, the following pertinent comment was included in his general statement:[84]

In giving my approval to this legislation, I am acting with the understanding, confirmed by congressional leaders, that there is nothing contained therein which can be construed as a limitation upon the existing powers of governmental agencies, such as the Commodity Credit Corporation, to make sales of agricultural commodities in the normal conduct of their operations.

V. THE POWER TO BUY AND SELL

The power to buy and sell conferred by the Act is important because it gives the Government unquestioned control over the use of the goods purchased, and enables the Government to maintain and increase supply without penalizing the consumer. Indeed, experience under the executive orders demonstrated that, if price stability is to be achieved, in many cases the Office of Price Administration or some other agency[85] must have power to buy commodities above established maximum prices and sell them below those prices.[86] If ceilings are set at levels so high as to permit profitable operations by high cost producers—if, in other words, maximum prices are geared to inefficient producers—two pernicious results will follow: there will be enormous profits for the average and low cost producers; and the general price structure will

[84] And see two bills introduced since the Act's passage: S. 2255, introduced on Feb. 9, by Senator Bankhead of Alabama for himself and Senators Thomas of Oklahoma, Gillette of Iowa, and Russell of Georgia, would limit the Commodity Credit Corporation to making sales or "other dispositions" not below a parity price, including transfers to other government agencies. This bill has been favorably reported, SEN. REP. No. 1054, 77th Cong., 2d Sess. (1942) with minor changes, by the Senate Committee on Agriculture and Forestry, and passed by the Senate on Feb. 25, 1942. 88 Cong. Rec., Feb. 25, 1942, at 1673. On Feb. 9, 1942, Senator Nye of North Dakota introduced S. J. Res. 132, forbidding any federal agency to "perform any function" in order to prevent, or having the effect of preventing, the price of any agricultural commodity from reaching a 110% of parity price.

The Department of Agriculture appropriations bill, fiscal year 1943, H. R. 6709 (passed by the House on March 13, 1942) prohibits the use of funds "for administrative expenses connected with the sale of government-owned or government-controlled stocks of farm commodities at less than parity prices" with certain exceptions regarding the use of deteriorated grain. The bill is now pending before the Senate Appropriations Committee.

[85] The power to sell government property, real or personal, must be specifically granted by the Congress. U. S. CONST., Art. IV, §3; Ashwander v. Tennessee Valley Authority, 297 U. S. 288 (1936); U. S. v. Nicoll, 27 Fed. Cas. No. 15,879 (C. C. D. N. Y. 1826); Wisconsin R. R. v. Price County, 133 U. S. 496 (1890); *Ex parte* Milligan, 4 Wall. 2 (U. S. 1866); 31 OPS. ATTY. GEN. 463 (1919); 33 *id.* 570 (1923); 34 *id.* 320 (1924). Because of this fact, and because of the limitations on the powers of existing agencies to buy and sell, as to the commodities with which they could deal, the purposes for which they could sell, or the administrative practice, the only practicable solution was to place the power in the Administrator.

[86] Precedents for coupling the power to buy and sell with price control can be found in practically every country which has undertaken to check inflation. Britain has sought to stabilize the cost of living by buying the entire supply of many imported items and distributing them at a loss. See Earley and Lacy, *British Wartime Control of Prices, infra.* The British, furthermore, have entered into long term contracts for the purchase of metals and other materials in the Dominions and Colonies. In this arrangement the producer gains by the elimination of market risks and the Government gains by the low price which it can obtain on long term contracts. Canada has bought the entire supply of a number of shortage items and is selling them in such a way as to prevent the skyrocketing of prices which might otherwise occur. Mr. Herbert Hoover's experience as Food Administrator during the World War likewise justifies the reasonableness and effectiveness of buying and selling as a supplement to direct price control.

be raised to inflationary levels. Yet if maximum prices are established below such levels, and no other steps are taken, needed marginal production will be lost.[87] Imported commodities also present a variety of problems, more or less peculiar to those commodities, which make stabilization through ordinary price ceilings virtually impossible.[88]

Section 2(e) was designed to meet these difficulties. The House of Representatives originally declined to give the Administrator any power whatsoever[89] and, indeed, declined to confer any additional power to buy and sell upon any existing agency.[90] The Senate reinstated a broad power to buy and sell to prevent inflationary price increases,[91] but the Conference Committee rewrote the provision, giving the Administrator power to buy and sell domestic or imported commodities, and to make subsidy payments, subject to the following limitations:[92]

(1) The power can be exercised only after a determination by the Administrator that the maximum necessary production is not being obtained or may not be obtained during the ensuing year;

(2) Any commodity which has been or hereafter may be defined as strategic or critical by the President pursuant to Section 5d of the Reconstruction Finance Corporation Act[93] may be bought or sold only by corporations created or organized pursuant to that section (the Administrator may, however, make recommendations concerning such buying and selling);[94]

[87] A suggested alternative to such "bulk line" price control—it was so designated during the World War—is differential pricing. This means the establishment of maximum prices for particular producers, or groups of producers, related to the individual producer's cost. Widespread use of this method would hopelessly disrupt the competitive relationship among consumers of the product. One consumer might be fortunate enough to obtain low cost output while his competitor could only buy from a high cost producer. By the time the prices of secondary products became adjusted to such cost relationships, the results might be even more inflationary than the "bulk line" system itself.

[88] "Sellers abroad are obviously not subject to price regulation by this country and prices of imported commodities will frequently reach inflated levels before the commodity becomes subject to our jurisdiction." *Senate Report* 11. Rewards for violations of ceiling prices are tremendous when shortages of shipping or blockades reduce supply to a mere fraction of demand. The temptation to profiteer can be effectively eliminated only by permitting the Government to control the supply and arrange for its distribution to ultimate consumers at reasonable prices. Moreover, where there is a domestic as well as a foreign source of supply, power to buy and sell precludes the unwarranted enrichment of importers when the domestic price is increasing as a result of increasing costs of production in this country.

[89] H. R. 5990, 77th Cong., 1st Sess. (1941), passed by the House of Representatives Nov. 28, 1941, merely authorized the Administrator to notify the President, who could then direct any existing agency to exercise its existing powers to buy or sell commodities.

[90] See *Senate Hearings* 106, 112-114.

[91] §2(e), H. R. 5990, 77th Cong., 1st Sess. (1941), as amended by the Senate and passed Jan. 10, 1942.

[92] §2(e), Pub. L. No. 421, 77th Cong., 2d Sess. (Jan. 30, 1942). In addition to the limitations set forth in the text, two further limitations appear: (1) Nothing in the section may be construed to affect the provisions of the Tariff Act of 1930, as amended; and (2) the Administrator may not prohibit trading in any agricultural commodity for future delivery if such trading is subject to the provisions of the Commodity Exchange Act, as amended. The former originated in the House, the latter, in the Senate.

[93] Act of June 10, 1941, Pub. L. No. 108, 77th Cong., 1st Sess., amends §5d of the Reconstruction Finance Corporation Act.

[94] This limitation originated in the House after strenuous objection was raised that duplication of effort would result if the Administrator were given coordinate power with RFC. It may be noted that, pursuant to the amendment of the RFC Act, Pub. L. No. 108, *supra* note 93, corporations may be organized by RFC with power "(a) to produce, acquire, carry, sell, or otherwise deal in strategic and critical materials as defined by the President; . . . (g) to take such other action as the President and the Federal Loan

(3) Commodities which are domestically produced may be imported only to the extent that the Administrator determines domestic production to be inadequate;[95] and

(4) No agricultural commodity may be sold or otherwise disposed of contrary to the provisions of the Agricultural Adjustment Act of 1938, as amended.[96]

Although the Act, generally speaking, authorizes the establishment of *maximum* prices, the power in the Administrator to "make subsidy payments to domestic producers . . . in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production . . . ," may in some cases be used to establish *minimum* prices. It may also be used to relieve undue hardship which may be involved in the application of any general or special price ceiling to particular producers whose output is needed in the war program. But all power in the Administrator under Section 2(e) may be dissolved with respect to any given commodity if the President defines such commodity as strategic or critical. In that event, the power to buy and sell or to make subsidy payments vests exclusively in RFC corporations.[97]

Section 2(e) further provides (and this is perhaps as important as the Administrator's power) that sales made by RFC corporations shall comply with established maximums, but may be made at prices below the prices paid. This provision was inserted because the Reconstruction Finance Corporation was reluctant to admit a power to dispose of any commodity below cost. Since one of the primary objectives of the Administrator was adequate authority in the Government to subsidize marginal production,[98] and to use the added output without inflating the price structure, this Congressional mandate should prove to be of value in furthering the purposes of the Act. It is, therefore, quite clear that the law does not prohibit RFC corporations, or the Administrator, from selling at a loss.

Although RFC corporations and perhaps other government agencies may be of substantial aid, the proper functioning of Section 2(e) plainly depends upon the appropriation by the Congress of sufficient funds with which to operate. Whether the Congress will effectively implement the section by reasonable appropriations remains to be seen.[99] If funds are not forthcoming, the difficulties of the Administrator will surely be enhanced, and the success of the price control program may even be jeopardized.

Administrator may deem necessary to expedite the national defense program, ..." Subsequent to passage of that act the corporate charters of Defense Supplies Corporation and Metals Reserve Company were amended to include the broad powers referred to in subsection (g).

[95] This limitation resulted from arguments that the Administrator would be empowered, if he so chose, to flood domestic markets with imported commodities to the detriment of domestic producers.

[96] See also §2(f) which provides that no agricultural commodities may be sold pursuant to this section at a price below the price limitations with respect to agricultural commodities.

[97] *Senate Hearings* 112-114. As of Jan. 27, 1942, 105 commodities had been designated as strategic or critical.

[98] *House Hearings* 387, 401-403, 652-653; *House Report* 6; 87 Cong. Rec., Nov. 24, 1941, at 9309; *id.*, Nov. 26, 1941, at 9412-9415; *id.*, Nov. 28, 1941, at 9436-9439; *Senate Hearings* 106-116.

[99] A provision that the proceeds of any sale should be used as a revolving fund for carrying out the purposes of the section was deleted in conference, so that new appropriations must be sought as the fund is depleted.

VI. PRICE FIXING, INDUSTRY ACTION, AND THE ANTITRUST LAWS

A good price controller should not only have before him all of the important facts about any prices he finds it necessary to regulate, but he must also be able to persuade the sellers, or most of them, that what he has done or proposes to do, under all the circumstances, is necessary and fair. The Act, therefore, provides that the Administrator shall, so far as practicable, consult with industry members before issuing any permanent price regulation or order, and shall, if requested by a substantial part of the industry, appoint and consult with industry advisory committees.[100] Experience has likewise demonstrated that during the early stages of a general price rise, when shortages are not yet acute, voluntary agreements to stabilize prices in the more concentrated and profitable industries will often suffice for a time to check speculative or unjustified increases. The Act, therefore, expressly sanctions such agreements.[101]

These provisions serve largely to codify the administrative practice of the Office of Price Administration as it existed prior to the statute. But industry members were quick to express their concern regarding the applicability of the antitrust laws to this type of government-industry cooperation. By his letter to Leon Henderson of April 29, 1941, Attorney General Robert H. Jackson laid down a working rule under which industry meetings, industry committee action, and voluntary agreements, requested by the Office of Price Administration, would "not be viewed by the Department of Justice as constituting a violation of the antitrust laws."[102] This was not a decision to suspend antitrust enforcement, but rather a declaration that such action was not subject to the prohibitions of the antitrust laws. Under the Act, the guarantee of immunity from prosecution acquires a legislative basis. Section 205(d) provides that persons acting in good faith pursuant to the Act, or pursuant to any requirement or agreement thereunder, shall not be "held liable for damages or penalties" in any

[100] "Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to the Administrator as it deems advisable." §2(a).

[101] "SEC. 5. In carrying out the provisions of this Act, the Administrator is authorized to confer with producers, processors, manufacturers, retailers, wholesalers, and other groups having to do with commodities, and with representatives and associations thereof, to cooperate with any agency or person, and to enter into voluntary arrangements or agreements with any such persons, groups, or associations relating to the fixing of maximum prices, the issuance of other regulations or orders, or the other purposes of this Act, but no such arrangement or agreement shall modify any regulation, order, or price schedule previously issued which is effective in accordance with the provisions of section 2 or section 206. The Attorney General shall be promptly furnished with a copy of each such arrangement or agreement."

[102] The procedure for clearance of antitrust matters with the Department of Justice is set forth in OPA, Office Order No. 5, Oct. 15, 1941; that for clearance with the Federal Trade Commission in OPA, Office Order No. 9, Nov. 26, 1941.

court.[103] The word "damages" protects against civil proceedings under the antitrust laws; "penalties" protects against criminal actions for fine or imprisonment. Civil proceedings by the Department of Justice to enjoin the continuation of certain acts, or by the Federal Trade Commission to cease and desist from certain practices, are probably still available, since such proceedings look toward neither "damages" nor "penalties."[104]

This legislative technique of exemption from antitrust liability without direct amendment of the antitrust laws has precedents in the Lever Food and Fuel Control Act,[105] the Transportation Act of 1920,[106] the National Industrial Recovery Act,[107] and the Agricultural Adjustment Act.[108] While Section 205(d) does not in terms mention the antitrust laws, the general exemption seems sufficiently broad.

There can of course be no doubt that the Congress, which has given the antitrust laws, may take them away. The Supreme Court in *United States v. Socony-Vacuum Oil Co.*,[109] while upholding a conviction for an antitrust law violation, expressly recognized that the defendants would have secured immunity had they complied with the appropriate provisions of the National Industrial Recovery Act. Accordingly, industry action which complies with the Emergency Price Control Act may safely be undertaken.

At the risk of arguing a case which Section 205(d) makes academic, it is submitted that industry action, requested by the Administrator, would be lawful even in the absence of Section 205(d). The sort of industry action which the Act envisages consists, mainly, of price stabilizing agreements between industry members and the Administrator, in the work of committees formed for this and other statutory purposes, and in conferences with the Administrator upon such matters. The necessity and economic soundness of such action, under the compulsion of war, probably in itself purges those acts of any illegality. But the analysis goes further.

Despite the stigma attached to the term "price-fixing," industry agreements under

[103] "No person shall be held liable for damages or penalties in any Federal, State, or Territorial court, on any grounds for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement, or agreement thereunder, or under any price schedule of the Administrator of the Office of Price Administration or of the Administrator of the Office of Price Administration and Civilian Supply, notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may be modified, rescinded, or determined to be invalid." §205(d).

[104] The Attorney General's letter of April 29, 1941, reserves to the Department of Justice "complete freedom to institute civil action to enjoin the continuation of acts or practices found not to be in the public interest and persisted in after notice to desist."

The letter is quoted extensively in Hamilton, *Utilization of the Sherman Act and the Price Emergency, infra.* ED.

[105] Act of Aug. 10, 1917, 40 STAT. 276, as construed in 31 OPS. ATTY. GEN. 376 (1919).

[106] §407(8), 41 STAT. 482, 49 U. S. C. §5(15), exempting from the Sherman Act carriers consolidated pursuant to an I. C. C. order.

[107] 48 STAT. 198 (1933), 15 U. S. C. §705, providing that any code approved by the President "shall be exempt from the provisions of the antitrust laws of the United States."

[108] §8(b), 48 STAT. 34 (1933), 7 U. S. C. A. §608(b), allowing the Secretary of Agriculture to enter into marketing agreements, and providing that: "The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful."

[109] 310 U. S. 150, 226-227 (1940).

authorized Government direction to set maximum rather than minimum prices are not necessarily invalid. Decisions interdicting the establishment of price floors by private agreement are commonplace.[110] Yet wooden application of the price-fixing ban to the setting of maximum prices would overlook the obvious fact that such price ceilings, far from raising prices to the consumer, prevent the unlimited increase of prices and allow price competition below the levels set.[111]

Probably because most peace-time price agreements of businessmen have raised prices rather than lowered them, little case-law exists on the validity of action directed at imposing a price maximum. *Delaware, Lackawanna & Western R. R. v. Kutter* is perhaps the most pertinent decision.[112] There a private milk carrier contracted with a railroad that if the railroad would carry his milk he would charge his customers "rates not in excess of those charged by competitive railways for similar services," and would pay the railroad 80% of his gross receipts for the transportation. The railroad repudiated the contract, and in an action brought by the milk carrier set up the defense that the contract violated the Sherman Act as restraining trade. The circuit court of appeals, in awarding judgment to the milk carrier, rejected the railroad's contention:[113]

> The provision that [the milk carrier] will charge for the transportation of milk rates not in excess of those charged by competitive railroads for similar services suggests that he is to be permitted to fix the rates subject to that restriction. If he could fix the rates solely as his own interests might dictate, it would be open to him to make rates prejudicial to the traffic or to particular shippers. But the limitation itself provides an ample protection against such an abuse of his authority, as no shipper would have just cause to complain unless his rates were in excess of the common standard for similar services. . . .
>
> The contract . . . can only operate in restraint of trade by permitting [the milk carrier] to charge such extortionate rates to milk shippers as would discourage shippers; and this it did not permit or contemplate.

The court's view that an agreement for maximum rates is outside the Sherman Act, as protecting rather than harming the consumer, is relevant here.

Similarly, an agreement during an emergency to outlaw a speculative practice such as hoarding need not run afoul of the Sherman Act. In *Fosburgh v. California*

[110] U. S. v. Socony-Vacuum Oil Co., 310 U. S. 150 (1940); U. S. v. Trenton Potteries Co., 273 U. S. 392 (1927).

[111] Certain types of maximum price-setting by industry unquestionably *do* transgress the antitrust laws. Combinations which seek to eliminate competition by predatory cutting of prices below the costs of production have several times been invalidated under the antitrust laws. U. S. v. American Tobacco Co., 221 U. S. 106, 160, 182 (1911); U. S. v. Corn Products Refining Co., 234 Fed. 964, 989, 1013 (S. D. N. Y. 1916); *cf.* U. S. v. U. S. Steel Corp., 251 U. S. 417, 440-441 (1920); U. S. v. International Harvester Co., 274 U. S. 693, 708 (1927).

Again, depressing prices by a combination of *buyers* rather than sellers has been held illegal. Swift & Co. v. U. S., 196 U. S. 375 (1905). But the agreements likely to be sponsored under the Act are those of sellers.

Cases holding illegal predatory price ceilings, or the establishment of price ceilings by buyers, may account for the occasional dictum that "depressing" prices is an illegal act. See, *e.g.*, U. S. v. Socony-Vacuum Co., *supra* note 110, at 223: "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity, in interstate or foreign commerce is illegal *per se*."

[112] 147 Fed. 51 (C. C. A. 2d, 1906).

[113] *Id.* at 61, 63.

and Hawaiian Sugar Refining Co.[114] the defendant sugar company contracted with the plaintiff candy company to supply it with 1250 tons of sugar, with the proviso that

> . . . buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same.

The candy company brought suit to have the contract set aside as in violation of the Sherman Act because of this clause. A decree dismissing the complaint was affirmed upon appeal. The court said:[115]

> In a sense, the agreement, considered in the abstract, is not without a tendency to restrict the absolutely free movement of sugar in ordinary trade relations. . . .
>
> . . . while it was true that free competition, as it respects the sugar commodity in the market, was somewhat interfered with, who can say that the policy . . . pursued by the Department of Justice, and, at its suggestion, conformed to by the defendant sugar company in entering into the contracts in question, was one which was prejudicial to the public interests, in that it unduly restricted competition, or unduly obstructed the course of trade?

The economic device used in the *Fosburgh* case is a practical method of allocation which prevents hoarding of the sugar supply by eliminating the middleman.

If these ends—the setting of price ceilings and the prevention of speculative and manipulative practices—do not run afoul of the antitrust laws, surely means ordinarily used to put them into effect enjoy equal validity. Thus, under the trade association cases in the Supreme Court sanctioning industry meetings for the discussion of lawful ends,[116] the Administrator may form industry committees, and confer with those committees and individual industry members (whether pursuant to Section 2(a) or Section 5) provided the ends sought are authorized by the law.

Nevertheless, the existence of a good case for the validity of industry action even in the absence of Section 205(d) does not mean that the section serves no useful function. There are some who for their own purposes are seeking to have the antitrust laws shelved at least for the duration. Opposition to such efforts should not obscure the fact that, when businessmen are asked by the Government to undertake voluntary action, they have a right to some assurance of an immunity which will be available without the necessity of fighting for it in court, even upon the basis of sound principles.[117] Section 205(d) provides that assurance.

More significant, however, than the contemporary impact of the antitrust laws, are the issues slowly being focused by an irresistible drive for increased production. In the rationalization of production and concentration of industry likely to be re-

[114] 291 Fed. 29 (C. C. A. 9th, 1923). [115] *Id.* at 34, 35.

[116] Maple Flooring Mfrs. Ass'n v. U. S., 268 U. S. 563, 578 (1925); Cement Mfrs. Protective Ass'n v. U. S., 268 U. S. 588 (1925); *cf.* Sugar Institute, Inc. v. U. S., 297 U. S. 553 (1936).

[117] On March 28, 1942, the President announced an agreement between the Attorney General and the Secretary of War and the Secretary of the Navy for the examination of pending and future antitrust proceedings and for the deferment of those which would "seriously interfere with the war effort." See N. Y. Times, March 29, 1942, p. 33.

For extended quotations from the letters embodying this agreement, see Hamilton, *Utilization of the Sherman Act and the Price Emergency, infra.* ED.

quired by the war production program, and valid under the antitrust laws, and in the necessarily widening sphere of government ownership of war production facilities, are the seeds of perhaps the most critical post-war problem of domestic economic policy.

VII. PROHIBITIONS

Section 4(a) of the Emergency Price Control Act specifies the unlawful conduct against which the civil and penal sanctions of Section 205 of the Act may be directed. In general, the section parallels those provisions which authorize the Administrator to issue maximum price and other regulations, to secure information and to require licenses, and makes unlawful the violation of any such regulation, order, or requirement.[118]

The basic prohibition against violation of ceiling prices is applicable not only to sellers, but may be extended by the Administrator to those buyers who buy or receive price-controlled commodities "in the course of trade or business." Since time immemorial buyers and sellers have conspired to avoid regulation by the price controller. And OPA's pre-statutory experience unfortunately furnishes no evidence of the development in this country of any exception to the ordinary rule. The moral resistance of American industrial buyers to violation of law is undoubtedly strong, but not yet quite strong enough to survive the temptation of current deliveries in a short market.[119]

Subsection (a) also provides expressly that the prohibition against receipt of an unlawful price is not limited by any pre-existing contract, agreement, or other obligation. This provision, in one form or another, was included in every draft of the price control bill. That the Administrator must have the power to cut across existing contracts is beyond question. If his authority were confined to future sales, maximum price regulations would be ineffective to the extent that forward delivery contracts were employed in the marketing of the particular commodity. And if sellers knew that future price regulations could not affect existing commitments, they could obtain practical immunity from anticipated future regulations by contracting for the sale of their entire output or stock. Moreover, in the tight markets which presently prevail, sellers might, by the threat of refusing to sell after the establishment of maximum prices, force the acceptance of long term contracts at exorbitant prices. Speculative contracting would become widespread. And every entry by the Administrator into a

[118] "SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202(b) or section 205(f), or to offer, solicit, attempt, or agree to do any of the foregoing."

[119] Such pressure from buyers can be most effective when the prospective purchaser is engaged in trade or business and is either a regular customer of the seller or is equipped to make so large a purchase at the unlawful price as to offer an incentive to unlawful conduct by the seller. Persons purchasing for immediate consumption, such as housewives, are not ordinarily in a position to exert this kind of pressure upon their suppliers, and are most likely to become unwitting violators. The prohibition, accordingly, does not run against them.

new commodity field would be accompanied by a flurry of price increases and futures contracting in related fields. In effect, a multi-price system would result in all regulated industries.

Moreover, if the price-fixed product were employed in the manufacture of other goods the ineffectiveness and inequity of price control which ignored existing contracts would be aggravated. Not only would it be difficult to control the prices of products resulting from such manufacture, but competitive conditions in the markets for these products would be disrupted. Manufacturers bound by contracts for supplies and materials at prices higher than the established maximums would be at an obvious disadvantage in relation to those producers who could obtain the advantage of lower prices resulting from the price controls.

Nor is there any present doubt that maximum price regulations, otherwise valid and constitutional, can properly be applied in such manner as to cut across prior contractual commitments. The *Gold Clause Cases* contain perhaps the most convincing single statement by the Supreme Court that Congressional power is not restricted by existing private agreements:[120]

> Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but, when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.

The immunity provisions of Section 205(d) are clearly an adequate defense in any suit by the seller against the buyer for failure to pay a contract price which has been rendered illegal.[121] May the buyer, however, insist upon his contract by offering the lawful price? The answer is likely to depend upon whether the contract price has been so substantially reduced that to require performance by the seller would be to insist upon a contract which the parties never made.[122] The ability of the buyer to

[120] Norman v. B. & O. R. R., 294 U. S. 240, 307-308 (1935). The opinion of Mr. Justice Brandeis in Lynch v. U. S., 292 U. S. 571 (1933), makes it clear that the same principle is applicable when Congress chooses to exercise one of its paramount powers, such as the war power, to cut across existing government contracts. See also Horowitz v. U. S., 267 U. S. 458 (1925).

[121] See note 103, *supra*. Whether the executive order of the President establishing a price control authority provides a similar defense is a separate question. The writer would answer that question in the affirmative. See Jersey Ice Cream Co. v. Banner Cone Co., 204 Ala. 532, 86 So. 382 (1920) (involving a World War priority order); Edward Maurer Co. v. Tubeless Tire Co., 272 Fed. 990, 992 (N. D. Ohio, 1921), *aff'd*, 285 Fed. 713 (C. C. A. 6th, 1922); RESTATEMENT, CONTRACTS (1932) §458. See also an admirable article by Professor E. Merrick Dodd entitled *Impossibility of Performance of Contracts due to Wartime Regulations* (1919) 32 HARV. L. REV. 789.

[122] The seller's excuse in this situation may be classed under either the defense of impossibility arising out of supervening legislation or the defense of frustration. See *Discharge of Contract by Subsequent Impossibility* (1931) 171 LAW TIMES 495, and BLAIR, IMPOSSIBILITY DUE TO WAR (1940) 7. In a case arising under a price schedule issued by OPACS while acting under executive order, Mr. Justice Schmuck held that the seller was excused from performing by reason of the price schedule. Kramer & Uchitelle, Inc. v. Eddington Fabrics Corp., N. Y. Sup. Ct., Oct. 1941.

There is small likelihood that sellers will use price regulation as a ground for wholesale termination of contracts because, being prohibited from selling at prices in excess of the established maximums, they cannot dispose of their goods more favorably to other purchasers. The Government in any event need not rely upon price to control the flow of goods. It may place compulsory orders, or requisition, allocate, or establish a system of priorities for, needed supplies and materials.

terminate the contract even though the seller is willing to deliver at the established maximum price will depend upon whether the contract is regarded as destroyed by the regulation[123] or as enforceable in a modified form by the seller. The latter result would prevent the buyer from using a regulation which lessens his burden as a pretext for terminating the contract.

A price regulation which cuts across existing contracts is also likely to raise questions about the treatment of existing inventories. To exempt dealer stocks from control would certainly encourage the speculative acquisition of commodities not already subject to regulation, and thereby produce unwarranted price increases. Yet if a ceiling on finished products were established below prevailing market levels, and made applicable to an existing inventory in the hands of middlemen, in some cases a loss might be required in the sale of those products.[124]

At the close of the last war Mr. Justice McReynolds stated that such a requirement would raise a "grave constitutional question."[125] The basis for this statement is not disclosed in the Court's opinion and the Constitution does not deal with the problem expressly. But if the Constitution permits the establishment of maximum prices, it would seem questionable whether a lasting distinction could be made to depend on whether the particular commodities were on hand or merely en route.

VIII. INVESTIGATIONS, RECORDS, AND REPORTS

The effectiveness of any regulatory agency depends largely upon its power to obtain information. In no field is this more true than in price control. Maximum price regulations can be formulated intelligently only upon the basis of complete information regarding complex economic and business facts. Equally important, from the enforcement point of view, is the power to compel testimony and the production of documents and to require persons affected by maximum price and other regulations to make and keep records, to permit necessary inspections, and to file reports.[126]

The information gathering powers conferred upon the Administrator by the Emergency Price Control Act seems adequate to make possible intelligent price action and effective enforcement.

The basic authority is contained in Section 202(a) which authorizes the Administrator "to make such studies and investigations, and to obtain such information," as

[123] See Boret v. Vogelstein, 188 App. Div. 605, 177 N. Y. Supp. 402 (1919), *aff'd*, 230 N. Y. 573, 130 N. E. 898 (1920).

[124] It is hardly probable that a maximum price regulation would cause loss in the sale of producer inventories, since it is a reasonably safe assumption that, in a rising-cost economy, goods produced prior to the issuance of a regulation were less costly to manufacture than goods produced afterwards.

[125] Matthew Addy Co. v. U. S., 264 U. S. 239, 245 (1924). The same order of the Fuel Administrator was involved in Majestic Coal Co. v. Bush & Co., 171 N. Y. Supp. 662 (1918), and by way of dictum the court said: "I can not find anything . . . which could compel legitimate jobbers in fuel to sell coal at prices less than the purchase prices bona fide paid by said jobbers to the mines. If there were anything in them to that effect, it would be void and unconstitutional." p. 667.

[126] During the period of its pre-statutory activity, OPA encountered many difficulties traceable to the lack of specific investigatory authority. Persons subject to price schedules frequently prevented detection of the actual circumstances surrounding sales and other transactions by the simple device of failing to keep or destroying records. In some instances enforcement was hindered by the refusal of persons to allow the inspection of relevant documents.

he deems necessary in prescribing any regulation or order, or in the administration and enforcement of the Act and the regulations and orders issued pursuant to its delegation of power.[127] The manner in which this authority may be exercised is detailed in the succeeding subsections of Section 202. The Administrator is authorized, by regulation or order, to require any person engaged in the business of dealing with any commodity or in the rental of housing accommodations to furnish all necessary information, to make and keep records, and to make reports. Testimony and the production of documents can be compelled by administrative subpena. Whenever necessary, the Administrator may require of persons engaged in dealing with commodities or in defense housing accommodations that they permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense area housing accommodations.[128]

Section 202(d) qualifies the power of the Administrator to compel the production of a person's documents at any place other than his regular place of business. The production of documents cannot be required, if, prior to the return date specified in the subpena issued with respect to the documents, such person either has furnished the Administrator with a certified copy of the documents or has entered into a stipulation with the Administrator regarding the information contained therein.[129] This is a novel provision designed to facilitate compliance by the small businessman.

Subpenas issued by the Administrator under the broad provisions of Section 202(b) of the Act are self-executing and may be enforced directly by the civil and criminal sanctions of Section 205 of the Act: the general prohibitions section, Section 4(a), expressly makes it unlawful "to do or omit to do any act in violation of any . . . order or requirement under Section 202(b)." Other subpenas issued by the Administrator[130] are enforceable only by application to the district court for an order requiring obedience to the subpena. Subpenas issued under Section 202(b) may also be enforced in this way.[131]

[127] "The Administrator is authorized to make such studies and investigations and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder." §202(a).

[128] "The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpena require any such person to appear and testify or to appear and produce documents, or both, at any designated place." §202(b).

[129] "The production of a person's documents at any place other than his place of business shall not be required under this section in any case in which, prior to the return date specified in the subpena issued with respect thereto, such person either has furnished the Administrator with a copy of such documents (certified by such person under oath to be a true and correct copy), or has entered into a stipulation with the Administrator as to the information contained in such documents." §202(d).

[130] "For the purpose of obtaining any information under subsection (a), the Administrator may by subpena require any other person to appear and testify or to appear and produce documents, or both, at any designated place." §202(c).

[131] The summary nature of proceedings to enforce subpenas under §202(e) is established by decisions under other comparable statutes. Since an investigation is a preparatory matter looking to the enforcement

Section 202(g) of the Act provides that no person shall be excused from complying with any investigatory requirement of the Administrator because of his privilege against self-incrimination, but that the immunity provisions of the Compulsory Testimony Act of February 11, 1893,[132] shall apply with respect to any individual who specifically claims his privilege. The requirement that such immunity must specifically be claimed[133] serves to put the Administrator on notice that immunity might result from the testimony or use of documents with respect to which the immunity is granted. Thus the Administrator is given an opportunity to determine whether it is more advantageous to compel the testimony and thereby make available to the witness whatever immunity may result, or to forego the evidence and retain the right to subject such person to whatever criminal and other sanctions may be available under the Act.[134]

Unjustified disclosure of confidential information is forbidden by Section 202(h) of the Act.[135] This provision, buttressed by Section 4(c) (which makes it unlawful for any OPA employee to disclose or use such information otherwise than in the

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of the Act and makes no determination between the parties, *In re* Securities and Exchange Commission, 84 F. (2d) 316, 317 (C. C. A. 2d, 1936), *rev'd as moot*, 299 U. S. 504 (1936), a proceeding to enforce an administrative subpena is not a "civil action" but is a summary proceeding of a special nature. *In re* Securities & Exchange Commission, *supra;* Goodyear Tire & Rubber Co. v. N. L. R. B., 122 F. (2d) 450 (C. C. A. 6th, 1941); Fleming v. Montgomery Ward & Co., 114 F. (2d) 384 (C. C. A. 7th, 1940), *cert. denied*, 311 U. S. 690 (1940). The Federal Rules of Civil Procedure do not apply to such proceedings. Goodyear Tire & Rubber Co. v. N. L. R. B., *supra;* Cudahy Packing Co. v. N. L. R. B., 117 F. (2d) 692 (C. C. A. 10th, 1941).

[132] 27 STAT. 443 (1893), 49 U. S. C. §46. This statute, so far as material, provides: "But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpena, or the subpena of either of them, or in any such case or proceeding; Provided, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying."

[133] Under immunity statutes failing to require a specific claim of privilege against self-incrimination as a condition of obtaining immunity, some courts have held that such a claim is not a condition to obtaining immunity. U. S. v. Goldman, 28 F. (2d) 424 (D. Conn. 1928); U. S. v. Pardue, 294 Fed. 543 (S. D. Tex. 1923); U. S. v. Armour, 142 Fed. 808 (N. D. Ill. 1906). But most courts hold that even under such statutes a claim of privilege is necessary. U. S. v. Lee, 290 Fed. 517 (N. D. Tex. 1923), *aff'd*, 297 Fed. 704 (C. C. A. 5th, 1924), *sub nom.* Sherwin v. U. S., *aff'd*, 268 U. S. 369 (1925); U. S. v. Lay Fish Co., 13 F. (2d) 136 (S. D. N. Y. 1926); U. S. v. Elton, 222 Fed. 428 (S. D. N. Y. 1915). The constitutional privilege against self-incrimination is waived by failure to claim the privilege before testifying. U. S. v. Murdock, 284 U. S. 141, 148 (1931); Brown v. Walker, 161 U. S. 591 (1896).

[134] It is settled law that neither a corporation, Hale v. Henkel, 201 U. S. 43 (1906); Wilson v. U. S., 221 U. S. 361 (1911), nor a corporate officer, Grant v. U. S., 227 U. S. 74 (1913); Wheeler v. U. S., 226 U. S. 478 (1913), can claim any privilege against self-incrimination because of the production of corporate records. No immunity results, therefore, from the compulsory production of corporate records. This exception arises from the fact that corporate records "are held subject to examination by the demanding authority." Wilson v. U. S., *supra* at 382. On the same principle, records required by law to be kept are beyond operation of the privilege against self-incrimination and the corresponding immunity. Spring Drug Co. v. U. S., 12 F. (2d) 852 (C. C. A. 8th, 1926); U. S. v. Sherry, 294 Fed. 684 (N. D. Ill. 1923); U. S. v. Mulligan, 268 Fed. 893 (N. D. N. Y. 1920). In U. S. v. Mulligan, *supra*, it was held that the privilege against self-incrimination did not extend to the records of an individual which were required to be kept under the authority of the Lever Act.

[135] "The Administrator shall not publish or disclose any information obtained under this Act that such Administrator deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless he determines that the withholding thereof is contrary to the interest of the national defense and security." §202(h).

course of official duty), should protect essential business secrets and should assure the requisite full disclosure of essential business facts to the Office of Price Administration.

IX. ENFORCEMENT

The Administrator is armed by the Emergency Price Control Act with a complement of enforcement tools which is in marked contrast to the circumscribed and unwieldy sanctions which were available to secure observance of price schedules issued during the pre-statutory period.[136] The statutory catalog includes the civil injunction, the criminal penalty, the treble damage suit, and the license.

Section 205(a) of the Act authorizes the Administrator to apply for injunctive relief whenever any person has engaged or is about to engage in any acts or practices prohibited by Section 4.[137] Equitable proceedings to enjoin violations of the Act, or to secure an order enforcing compliance may be brought by the Administrator either in the federal district courts or in the courts of any State or Territory.[138] OPA attorneys may appear for and represent the Administrator in these proceedings and in any other proceeding which the Administrator is authorized to bring. The Act provides that a permanent or temporary injunction, restraining order, or other necessary order shall be granted upon a showing by the Administrator to the Court that the defendant has engaged or is about to engage in any unlawful acts or practices. Neither the validity of the Act nor the validity of the regulation which has been violated is involved in any such proceeding.

Section 205(b) of the Act states that any person who willfully violates any provision of Section 4, or who willfully falsifies any document or report required by the Act, shall be subject to a fine of not more than $5,000, or to imprisonment for not more than one year, or both. Whenever the Administrator has reason to believe that any person has violated the criminal provisions of the Act, he may certify the facts to the Attorney General, who may, in his discretion, bring an appropriate criminal proceeding in the proper federal district court.

A third sanction which may afford some incentive to general public participation in the compliance program is provided by Section 205(e). Any person who buys

[136] Despite handicaps resulting from enforcement sanctions which were of necessity ill-suited to particular case treatment, 60% of the pre-statutory cases in which violations were established after compliance conferences terminated in agreements to make full restitution and to abide by the price schedules in the future. In 12% of the cases violations of a minor character were established and letters of warning sent to the persons involved. The remainder of the cases either concerned consumers, against whom as a class effective sanctions were peculiarly difficult to operate, or are yet pending.

[137] "Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order or other order shall be granted without bond." §205(a).

[138] Criminal proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred; other proceedings may be brought not only in such district, but also in the district wherein the defendant resides or transacts business. Process may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found. §205(c).

a commodity for use or consumption other than in the course of trade or business, or who pays rent, at a rate above that established by a maximum price or rent regulation, may bring an action either for $50 or for three times the amount of the overcharge, plus reasonable attorney's fees and costs as determined by the court. If the purchaser in any given transaction is not entitled to bring suit, the Administrator may sue for the amount involved on behalf of the United States. Proceedings under this subsection (which does not become effective until July 30, 1942) may be brought in any court of competent jurisdiction, but must be brought within one year after delivery is completed or rent is paid.[139]

This provision has caused some concern on the ground that it may be abused not only by irate and uninhibited consumers and consumer groups, but by others less well intentioned. It is distinctly unpleasant in wartime to be hauled into court and charged with profiteering: a seller might well prefer to forestall the threat with a cash payment. To this criticism there are two answers. The first is that in the more blatant cases of abuse, the Administrator could intervene on behalf of the defendant and probably would.[140] The second is that a wise public policy requires, when the stakes are so large and the task of enforcement may be so great, that the Administrator be allied with his most numerous beneficiaries, the consumers. Whether Section 205(e) will in fact ease the burden of enforcement very likely depends on the extent to which the country accepts price control as vital to the war effort. Only if it becomes a patriotic duty to comply with price ceilings, and unpatriotic to bootleg goods, will Section 205(e) be of any substantial value.

Of all the sanctions provided by the Act, however, licensing is likely to prove the most useful. In industries in which great numbers of persons are engaged, the requirement of licenses provides an excellent means of building up a register of persons subject to regulation. License suspension even for a limited period is a more flexible and less harsh procedure than criminal prosecution and, in the great majority of cases, is vastly more of a deterrent than the suit in equity to enjoin further violations.

Moreover, experience has established the effectiveness of licensing as a regulatory technique. The licensing sanction has frequently been employed in important federal

[139] The use of civil damage suits as an aid in the enforcement of a regulatory statute is not a new procedure. Similar provisions exist in the patent law, 35 U. S. C. §67, in laws protecting trade marks, 15 U. S. C. §96, and trade marks in the international register, 15 U. S. C. §124. They are found in the provisions against dumping foreign commodities, 15 U. S. C. §72, or in operating a railroad inequitably, 45 U. S. C. §83. Well-known examples are also contained in the Sherman Anti-Trust Act, 15 U. S. C. §15 (since this provision has been held inapplicable to the United States, U. S. v. Cooper Corp., 312 U. S. 600 (1941), §205(e) expressly provides for such suits on behalf of the United States under certain circumstances), the Wilson Tariff Act, 28 STAT. 570 (1894), and the Clayton Act, 15 U. S. C. §15. A very recent use of this sanction is to be found in the District of Columbia Emergency Rent Act, §10, Pub. L. No. 327, 77th Cong., 1st Sess. (Dec. 2, 1941). Statistical data regarding a similar provision in the Fair Labor Standards Act of 1938, 29 U. S. C. A. §216, illustrates its enforcement value. During the first three years of administration of that Act, approximately 85% of all enforcement proceedings, about 2815 in all, were such civil damage actions.

[140] ". . . In any suit or action wherein a party relies for ground of relief or defense upon this Act or any regulation, order, price schedule, requirement, or agreement thereunder, the court having jurisdiction of such suit or action shall certify such fact to the Administrator. The Administrator may intervene in any such suit or action." §205(d).

and state regulatory legislation.[141] In Canada and in England licensing is now relied upon as the principal sanction to secure the observance of price and rationing regulations.[142] In the United States during the World War, the Lever Act conferred licensing powers upon the Food Administrator, and at the end of the war 263,737 firms were under license in the Food Administration alone. In his Annual Report for 1917,[143] Food Administrator Herbert Hoover testified to the effectiveness of his licensing powers:

> The licensing system, however, is the backbone of all control. Without compulsion there will always be a few slackers in every trade who will profit by the patriotism of the majority and prevent any effective control.

Indeed, the necessity of licensing as a price control sanction was demonstrated so clearly in the World War experience that President Wilson, without statutory authority, conferred licensing powers upon the Fuel Administration.

The provisions of the Act[144] which confer the basic licensing authority upon the Administrator do not explain how licenses are to be issued, except to say that a separate license need not be issued for each commodity or for each maximum price regulation. As a matter of administrative efficiency, license applications will normally be required from all persons in the industry subject to licensing control, since a register of persons subject to regulation can most easily be compiled from the applications received.[145] Whether actual physical documents will be sent to license applicants is likely to depend on the nature of the industry. The distribution of such licenses and a requirement of conspicuous display would provide a simple way to determine whether a particular seller has, in fact, obtained a license. But there may be grave administrative difficulties if applications were required and licenses printed and distributed, say, in the entire retail trade. In some cases general licenses may be issued coupled with a supplementary reporting requirement. These and other matters of administrative machinery must of course be worked out in practice and by reference to the circumstances existing in particular fields of control.

The licensing powers of the Administrator are surrounded with uniquely elab-

[141] *E.g.*, the "Hot Oil" Act, 15 U. S. C. A. §715; Natural Gas Act, 15 U. S. C. A. §717(b); Federal Firearms Act, 15 U. S. C. A. §§901-909; Federal Alcohol Administration Act, 27 U. S. C. A. 203-204(e); Federal Communications Act, 47 U. S. C. §§151, 303, 309, 319, 402; Motor Carrier Act, 49 U. S. C. A. §§301-327; Civil Aeronautics Act, 49 U. S. C. A. §§401-682; Gold Reserve Act, 31 U. S. C. §§440-446; Commodity Exchange Act, 7 U. S. C. A. §§1-17(a); Cotton Standards Act, 7 U. S. C. A. §§51-65; Packers and Stockyards Act, 7 U. S. C. §§181-231; U. S. Warehouse Act, 7 U. S. C. §§241-273; Perishable Agricultural Commodities Act, 7 U. S. C. §499a; Tobacco Control Act, 7 U. S. C. A. §§515-515k; Securities Act, 15 U. S. C. §77a; Securities Exchange Act, 15 U. S. C. §78a; Public Utilities Holding Company Act, 15 U. S. C. A. §79; Trust Indenture Act, 15 U. S. C. A. §§77aaa-77bbbb.

[142] See Memorandum, "Emergency Price Control Legislation—Enforcement Provisions," *Senate Hearings* 181, 186 *et seq.*

[143] H. R. Doc. No. 837, 65th Cong., 2d Sess. (1917). And see ANN. REP. U. S. FOOD ADM'N (1918) 16. But note Mr. Hoover's condemnation of licensing as a price control sanction before the Senate Banking and Currency Committee, *Senate Hearings* 416.

[144] §205(f).

[145] "The licensing provision is necessary where you do not know who is doing business. It is impossible where there is a multiplicity of sellers to know to whom a regulation should be specifically addressed." Testimony of Leon Henderson, *Senate Hearings* 150.

orate safeguards for the protection of private rights. No person may be refused a license, unless an order of suspension of a previous license is in effect against him. No license may contain any provision which could not be prescribed by regulation or order under Section 2 or Section 202 of the Act. The licensing provisions are so drawn as to prevent even the appearance of administrative interference with civil liberties or with the free expression of ideas. No license may be required as a condition of selling or distributing newspapers, books, motion pictures, or radio time.[146]

Concern for the protection of private interests against possible abuse of administrative power is particularly evident in the guarded procedure for license suspension spelled out in Section 205(f)(2) of the Act. Whenever the Administrator believes that a licensee has violated any of the provisions of his license, or of any regulation or order to which he is subject, a warning notice must be sent by registered mail. If there is reason to believe that the licensee, after receipt of warning notice, has again been guilty of a violation, the Administrator may petition for a court order suspending the license for a period of not more than 12 months.

The issue open in proceedings for license suspension is, by the terms of the Act, limited to the question whether the licensee has, in fact, violated any provision of the license, or of a regulation or order, after the receipt of the warning notice. If the court finds this to be the fact, an order is issued suspending the license to the extent that it authorizes the licensee to sell the commodity or commodities in connection with which the violation occurred, or to the extent that it authorizes the licensee to sell any commodity or commodities to which a maximum price regulation is applicable. Since the activities of but one person are involved, a stay of any order of suspension may be granted in accordance with local practice when justifying circumstances exist.

Congressional consideration for small business in distant communities is shown by the provision of Section 205(f)(2) that proceedings for license suspension must be brought by the Administrator in the state or territorial court, unless the licensee is doing business in more than one state or unless his gross sales exceed $100,000 per annum.[147] Section 205(f) represents a compromise between administrative necessity and the protection of individual rights. Although proceedings for license suspension are of an equity nature,[148] and so do not require jury trial of the facts, suspension

[146] And see the further proviso of §205(f) (1): ". . . no license may be required of any farmer as a condition of selling any agricultural commodity produced by him, and no license may be required of any fisherman as a condition of selling any fishery commodity caught or taken by him."

[147] The requirement that license suspension proceedings be brought in state courts was suggested by Senator Brown at a late stage of the hearings before the Senate Committee. *Senate Hearings* 550. This reference to the state courts may raise constitutional questions involving federal-state relations. However, the power of the Congress to impose jurisdiction to suspend licenses upon the state courts seems well established by decisions in which the Supreme Court has held that a state court has no discretion to refuse to exercise its jurisdiction in actions to enforce rights created by federal law. Second Employers' Liability Cases, 223 U. S. 1, 58 (1912); McKnett v. St. L. & S. F. Ry., 292 U. S. 230, 233 (1934); U. S. v. Bank of New York, 296 U. S. 463, 479 (1936). And see the discussion of federal-state relations in Opinion of the Legislative Counsel, U. S. Senate, May 26, 1926, 67 CONG. REC. 10087, 10089-10091. Compare Prigg v. Pennsylvania, 16 Peters 539 (U. S. 1842).

[148] *Senate Report* 27.

by court order may be less speedy, in many cases, than the more usual procedure of administrative suspension with subsequent judicial review.[149] The fact that suspension proceedings will often be brought in the state courts means that those charged with the administration and enforcement of the Act must take account of 48 different systems of trial and appellate practice.

At the same time, it is evident that the procedure required by the Act will provide as nearly perfect assurance against arbitrary administrative action as could reasonably have been devised. Public recognition of the fairness of the licensing provisions of the Act will greatly enlarge its usefulness.

X. TERMINATION DATE

A legislative compromise is reflected in Section 1(b) of the Act, which provides that the authority of the Act, and all regulations or orders issued thereunder, shall terminate on June 30, 1943, or upon an earlier date specified by Presidential proclamation or by concurrent resolution of the Congress. The provision for termination by concurrent resolution, although not without precedent in recent defense legislation,[150] raises serious questions. If the issue be justiciable,[151] a close question of constitutionality is presented.[152] In any event, one may question the political wisdom of a device which, in substantial effect, deprives the President of his constitutional prerogative to exercise a veto power over legislation.

It is certainly to be expected that the authority of the Act will be continued beyond the specified termination date, June 30, 1943. Even if the war has been fought to a successful conclusion by the beginning of 1943, which now seems realistically improbable, the inflation which followed the First World War[153] stands as an urgent warning that the brakes against inflation must not be taken off before a full return to a peace-time economy has been achieved. When the war is won, the tested tools of economic direction must then be turned to the winning of the peace.

[149] The original price control bill, H. R. 5479, §205(c), provided for administrative suspension or revocation of licenses, subject to judicial review in the Emergency Court of Appeals. The House Committee struck the entire licensing subsection from the bill. The licensing provisions in their present form were inserted by the Senate Committee. See *Senate Report* 8-9, 26-28; *Conference Report* 26.

[150] For example, the powers of the President under the Lend-Lease Act, Pub. L. No. 11, 77th Cong., 1st Sess. (March 11, 1941), can be terminated by concurrent resolution declaring them no longer necessary for the defense of the United States.

[151] See Coleman v. Miller, 307 U. S. 433 (1939).

[152] Article I, Section 7, of the Constitution provides: "Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States, and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill."

The constitutionality of the concurrent resolution provision of H. R. 5479 was considered in a memorandum submitted by the writer to the House Banking and Currency Committee. *House Hearings* 983-985.

[153] "In 1918 prices again started upward, reaching an index of about 200 before the end of the year. Inflation was not over, however, with the Armistice in November 1918; in fact, the worst was yet to come. The controls were taken off too soon and the index of prices spiraled up another 40 points to 240 in 1920. From that point we had severe deflation with bankruptcy and all the losses that deflation entails." Memorandum, "The World War Inflation," *House Hearings* 204.

THE EMERGENCY PRICE CONTROL ACT OF 1942: ADMINISTRATIVE PROCEDURE AND JUDICIAL REVIEW

NATHANIEL L. NATHANSON*

The Office of Price Administration had attained a considerable measure of maturity before the passage of the Emergency Price Control Act of 1942.[1] When the Administrator took office under the statute,[2] 105 price schedules had already been issued pursuant to the authority conferred by executive order.[3] Administrative procedures had been shaped in the light of the tasks at hand and the skilled personnel available; contact between the office and the courts had been practically non-existent.[4] In many respects the statute requires no changes in the informal procedures thus developed. It does, however, provide a pattern for the issuance, reconsideration and judicial review of the regulations and orders of the Administrator.

No fundamental innovations are required in administrative procedures preceding the establishment of price ceilings. Information may still be gathered through staff

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The opinions expressed herein represent only the personal views of the author and not the official views of the Office of Price Administration.

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[1] Pub. L. No. 421, 77th Cong., 2d Sess. (Jan. 30, 1942). The Office of Price Administration and Civilian Supply was established by Executive Order No. 8734, dated April 11, 1941, 6 FED. REG. 1917 (1941). The name was changed to Office of Price Administration by Executive Order No. 8875, dated Aug. 28, 1941, 6 FED. REG. 4483 (1941).

[2] Feb. 11, 1942; see 7 FED. REG. 1201 (1942).

[3] All save Price Schedules Nos. 5, 14, 25 and 27, which had been withdrawn prior to Feb. 11, 1942, were reprinted pursuant to §206 of the Act in 7 FED. REG. 1201-1406 (1942).

[4] In Pennsylvania Co. for Ins. on Lives etc. v. Cincinnati & L. E. R. R., S. D. Ohio, Sept. 19, 1941 (unreported), a bankruptcy court forbade a trustee to sell the debtor's property at a price above the ceiling established in a price schedule. See also Oliver Clyde Riggs, E. D. Pa., Oct. 28, 1941 (unreported). In this case the Price Administrator, having been allowed to intervene, sought a court order directing the receiver not to sell machine tools at prices above those established by Price Schedule No. 1. The court refused to decide the legal question raised or to postpone the sale but suggested to the receiver that the auctioneer at the beginning of the sale announce that all prices in excess of the schedule would be subject to the confirmation of the court. But In the Matter of the Bender Body Co., N. D. Ohio, Dec. 19, 1941 (unreported), a referee ruled that a price schedule was not applicable to a bankruptcy sale, and denied the motion of the Price Administrator to intervene. As this is written the matter is pending on a petition for review before a district judge.

investigations and informal conferences,[5] although formal pre-issuance hearings may be held when deemed advisable by the Administrator, and permanent price regulations must now be accompanied by statements of the considerations involved in their issuance.[6] More far-reaching changes in administrative procedure are indicated by Section 203 of the Act, which provides that after the issuance of a regulation or order under Section 2, formal protests may be filed with the Administator, who, if a protest is denied in whole or in part, must accompany the denial with an opinion indicating the grounds for such action.[7] The method of judicial review is provided by Section 204, which establishes the Emergency Court of Appeals and gives it exclusive jurisdiction, subject to writ of certiorari from the Supreme Court, to determine the validity of regulations or orders issued under Section 2.[8]

I

It is noteworthy that, during the consideration of the various price control bills, Congress squarely rejected the proposition that formal hearings be required before the issuance of price regulations.[9] The entire legislative history indicates recognition

[5] In addition, the Act, §202, confers on the Administrator power to compel the production of information by the issuance of subpenas, by regulations or orders, or by requiring reports.

[6] To provide the flexibility necessary to deal with the complicated problem of price control the Administrator is authorized to issue temporary maximum price regulations without any statements of considerations. Such regulations may be issued whenever, in his judgment, such action is necessary to effectuate the purposes of the Act and may be effective for not more than 60 days. Prices fixed must be those prevailing within five days prior to the issuance of the regulation. §2(a). See, *e.g.*, "Temporary Maximum Price Regulation No. 5, Mattresses, Springs, Studio Couches and Metal Beds and Cots," 7 FED. REG. 1647 (1942).

[7] On Feb. 12, 1942, the Administrator issued Office of Price Administration Procedural Regulation No. 1—Procedure for the Issuance, Protest, and Amendment of Maximum Price Regulations (hereinafter cited as "Proced. Reg. No. 1"). 7 FED. REG. 971-975 (1942). Procedural regulations for administration of rent control and for industry committees have not yet been issued.

[8] Section 2 authorizes the Administrator to issue regulations or orders fixing maximum prices or maximum rents. He is also empowered to regulate or prohibit speculative or manipulative practices, including changes in form or quality, hoarding, and renting and leasing practices, which, in his judgment, are equivalent to or likely to result in price or rent increases. Price schedules issued under the authority of the Executive Order No. 8734, prior to the date on which the Price Administrator took office under the statute, are, by the provisions of §206 of the Act, given the same effect as if issued under the authority of §2. They are also made subject to the protest procedure and to the exclusive jurisdiction of the Emergency Court of Appeals. Hereafter when reference is made to regulations or orders issued under §2, it is to be understood that such price schedules are included. Since the passage of the Act, the Court of Common Pleas for Lucas County, Ohio has held that a price schedule effective under §206 partly superseded a state statute requiring sales of municipal property to be to the highest bidder. Rosenblatt v. City of Toledo, (in Equity) Decision No. 159983, April 6, 1942.

[9] The provisions of the bill reported by the House Banking and Currency Committee were virtually identical in this respect with the provisions of the Act. See H. R. REP. No. 1409, 77th Cong., 1st Sess. (1941) 10-12 (hereinafter cited as *"House Report"*); H. R. 5990, 77th Cong., 1st Sess. (1941). See also Sen. Comm. Print, *Hearings before Sen. Committee on Banking and Currency on H. R. 5990*, 77th Cong., 1st Sess. (1941) 72-105 (hereinafter cited as *"Senate Hearings"*). The first bill passed by the House authorized the issuance of price regulations by the Administrator without prior hearing, followed by opportunity for full hearing before an administrative Board of Review while the regulations remained in effect. H. R. 5990 (in the Senate), 77th Cong., 1st Sess. (1941). The Senate rejected this. The proposal of Senator Taft to require hearings prior to the issuance of price regulations but authorizing temporary regulations without prior hearings to remain in effect for not more than sixty days was never brought to a vote. This device would have been totally ineffective for in many cases formal hearings could not have been completed in the time allowed. The Act does provide that the Administrator should, when practicable, consult with representative members of the industry prior to the issuance of a regulation or order

of the fact that, in a war economy, effective price control cannot wait upon formal hearings.[10] Immediate action often becomes necessary because of sudden changes, wrought by governmental decree or fortunes of war, in conditions of supply or demand. Too often prolonged consideration of contemplated action would encourage speculative activities and render eventual control all the more difficult. As indicated by the provision authorizing temporary maximum price regulations,[11] Congress recognized that even the statutory requirements with respect to statements of considerations accompanying the issuance of permanent price regulations would be too cumbersome to meet emergency situations.[12]

The omission of hearings before the issuance of price regulations seems to raise no serious constitutional difficulties, even in the absence of the peculiar considerations applicable to war-time legislation. In terms of the familiar dichotomy between quasi-legislative and quasi-judicial action, it is clear that price regulations under Section 2 are quasi-legislative and therefore that notice and hearing are not prerequisite to their issuance.[13] This view is underscored by the provision in Section 2(a) of the statute that "As used in the foregoing provisions of this subsection, the term 'regulation or order' means a regulation or order of general applicability and effect."[14]

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under §2. This practice was generally followed before the enactment of the statute. After a maximum price is established the Administrator is required to appoint an industry advisory committee, if requested to do so by a substantial portion of the industry. This committee is authorized to make recommendations to the Administrator.

[10] See *e.g., House Report* 9-10: "The procedure governing the preparation and issuance of substantive regulations and orders prescribing ceilings or regulating practices has necessarily been adapted to the nature of the powers granted, which involves a broad delegation of legislative power, to the fact that such regulations will apply to large numbers of persons, and to practical considerations, such as the necessity for immediate action to check rapidly rising prices and the importance of avoiding speculative disturbances of the market pending the determination of a price ceiling."

[11] Act, §2(a). See note 6, *supra.*

[12] See SEN. REP. No. 931, 77th Cong., 2d Sess. (1942) 15 (hereinafter cited as *"Senate Report"*). "The authority to issue regulations temporarily freezing prices is necessary principally in order to enable the Administrator to meet particular emergency situations as they arise. The Administrator is thereby given sixty days to make such studies and investigations as will enable him to issue permanent regulations."

[13] See Bi-Metallic Investment Co. v. Colorado, 239 U. S. 441, 445 (1915). "Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." See also Buttfield v. Stranahan, 192 U. S. 470 (1904); Norwegian Nitrogen Products Co. v. U. S., 288 U. S. 294 (1933); Highland Farms Dairy, Inc. v. Agnew, 16 F. Supp. 575 (E. D. Va. 1936), *aff'd*, 300 U. S. 608 (1937); State *ex. rel.* State Board of Milk Control v. Newark Milk Co., 118 N. J. Eq. 504, 179 Atl. 116 (1935); Spokane Hotel Co. v. Younger, 113 Wash. 359, 194 Pac. 595 (1920); *cf.* Colteryahn Sanitary Dairy Co. v. Milk Control Commission of Pennsylvania, 332 Pa. 15, 1 A. (2d) 775 (1938), where the statute provided for a pre-issuance hearing. Generally, see Hankins, *The Necessity for Administrative Notice and Hearing* (1940) 25 IOWA L. REV. 457.

[14] It is clear that there is no requirement that regulations or orders be uniform in their application or effect. See §2(c) which provides that: "Any regulation or order under this section . . . may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act." Such adjustments and exceptions may be provided for specifically in the price regulations, or in terms of general classifications to be applied by order granting or denying petitions for adjustment and exception under the latter procedure. Such orders are subject to the protest procedure. Proced. Reg. No. 1, §§1300.38-41. Any person seeking an adjustment or exception not provided for in existing general

More substantial legal problems are presented by the provisions in Section 203 of the Act establishing the protest procedure. This section authorizes any person subject to any provision of a regulation or order issued under Section 2, or of a price schedule effective under Section 206,[15] "to file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections." (§203(a)) Within a period specified in the statute,[16] the Administrator must either grant or deny the protest, notice it for hearing or provide an opportunity to present further evidence in connection therewith.[17] If the Administrator denies the protest he must "inform the protestant of the grounds upon which such decision is based and of any economic data and other facts of which the Administrator has taken official notice." This section also provides that the Administrator may take "official notice of economic data and other facts, including facts found by him as a result of action taken under section 202" (§203(b)); and that he may limit protest proceedings to the "filing of affidavits, or other written evidence, and the filing of briefs." (§203(c))

The protest proceedings may be regarded as serving two separate functions. On the one hand, they provide the Administrator with the opportunity to reconsider the regulation or order under attack and to amend or withdraw it.[18] In addition, they provide the basic record for judicial consideration of the validity of the regulation or order in the Emergency Court of Appeals. Insofar as the protest proceedings are

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classifications, may file a petition for amendment of any price regulation to which he is subject, or which affects him. In addition, any person subject to any provision of a price regulation may file a petition for amendment if he has failed to file a proper protest within the time specified in the statute. Moreover, any person affected by a maximum price regulation, but not subject thereto, may petition for amendment if he desires modification thereof. Proced. Reg. No. 1, §1300.35. Rulings on petitions for amendment are not subject to the protest procedure.

[15] See Proced. Reg. No. 1, §1300.9: "A person is, for the purposes of this Regulation, [§§1300.1-1300.56 incl.] subject to a provision of a maximum price regulation only if such provision prohibits or requires action by him."

"Whenever necessary or appropriate for the full and expeditious determination of common questions raised by two or more protests the Administrator may consolidate such protests." Proced. Reg. No. 1, §1300.22.

[16] The Administrator must dispose of protests, "Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing or ninety days after the issuance of the regulation or order . . . in respect of which the protest is filed, whichever occurs later, ..." §203(a).

[17] By the provisions of Proced. Reg. No. 1, §1300.17, protests, affidavits and briefs submitted therewith may be amended within a period of sixty days after the issuance of the maximum price regulation attacked, or, in the case of a protest properly filed more than sixty days after the issuance of such regulation, within fifteen days after such protest is filed. After the time prescribed, amendment or a presentation of further evidence is allowed only when, in the judgment of the Administrator, such action will not unduly delay the completion of the protest proceedings. However, no amendment adding a new ground of protest is permitted.

[18] A regulation, order or price schedule may be modified or rescinded by the Administrator even after the filing of a complaint in the Emergency Court of Appeals. §204(a). *Cf.* Ford Motor Co. v. N. L. R. B., 305 U. S. 364 (1939), holding that in the absence of statutory provision to the contrary the jurisdiction of the reviewing court attached when the transcript was filed and that the agency had no absolute right to withdraw its petition for enforcement but permitting such withdrawal as a matter of judicial discretion. The Court distinguished *In re* N. L. R. B., 304 U. S. 486 (1938), where the agency had been permitted to withdraw its order after a petition for review had been filed, on the ground that in that case the transcript had not been sent to the Circuit Court of Appeals before the order was withdrawn.

designed for the purpose of administrative reconsideration, they are as much quasi-legislative in character as pre-issuance hearings, and, being granted as a matter of statutory rather than constitutional right, must be taken subject to statutory conditions. However, since the protest record is also the primary record for judicial determination of the validity of the regulation or order, it may be suggested that the protest procedure must meet the standards applicable to quasi-judicial administrative proceedings. Under this approach, the principal problems that may be presented are the extent to which written evidence may be substituted for oral hearing, and official notice for more orthodox methods of proof.

Administrative proceedings confined to written evidence and briefs are, of course, no novelty in American law.[19] However, such proceedings afford no opportunity for cross-examination of witnesses; and there are some dicta of the United States Supreme Court to the effect that the denial of the right to cross-examine is a denial of procedural due process.[20] Those expressions have invariably occurred in cases where an administrative agency has denied to a party the opportunity of knowing and rebutting the evidence upon which the agency relied.[21] Many other cases have recognized that the essence of fair hearing is not the right to cross-examine but the right to have adequate opportunity for rebuttal.[22] The experience of other administrative agencies indicates that in dealing with complicated economic data the best method of exploring the facts is frequently not the oral examination and cross-examination of witnesses but the exchange of verified written evidence.[23] The apparent intention of the

[19] Perhaps the most familiar example is the shortened procedure of the Interstate Commerce Commission used, with the consent of the parties, to dispose of formal complaints by shippers. The Perishable Agricultural Commodities Act of 1930, 46 STAT. 534 (1930), 7 U. S. C. §499(f)(c), provides that in reparations cases written evidence, exclusively, shall be used in cases wherein the amount claimed as damages does not exceed $500. Above that amount consent of the parties to this procedure is necessary. One of the most unusual examples is the use of this procedure by the National Railroad Adjustment Board in adjudication of contract rights. Decision is based on materials in the files, the written submissions of carrier and employee groups, and the "written oral argument." See REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, SEN. DOC. No. 8, 77th Cong., 1st Sess. (1941) 404-410, for a full discussion of these and other illustrations.

[20] See Interstate Commerce Comm'n v. Louisville & Nashville R. R., 227 U. S. 88, 93 (1913); Lloyd Sabaudo S. A. v. Elting, 287 U. S. 329, 339-340 (1932).

[21] See the REPORT OF THE SECRETARY OF LABOR'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (Dimock, Hart and McIntire), The Immigration and Naturalization Service (1940) 45, and cases there cited. See also VAN VLECK, THE ADMINISTRATIVE CONTROL OF ALIENS (1932) 165-170; Brown, *Public Service Commission Procedure* (1938) 87 U. OF PA. L. REV. 139, 153-154. Brown points out that most of these decisions declare that the right of hearing includes the right to cross-examine witnesses without any serious consideration of the problem. *Cf.* Powhatan Mining Co. v. Ickes, 118 F. (2d) 105 (C. C. A. 6th, 1941). In that case the Bituminous Coal Division relied on a statutory requirement of "confidential" treatment to justify its refusal to disclose the source of information tabulated for the record. The court held that this denied a "fair hearing" in that cross-examination was prevented. Actually, the real objection to the procedure was that it prevented the company from meeting or explaining this evidence. A "fair hearing" was denied because of the lack of opportunity for rebuttal.

[22] See Low Wah Suey v. Backus, 225 U. S. 460, 471-472 (1912); Pacific Livestock Co. v. Oregon Water Board, 241 U. S. 440, 453 (1916); U. S. v. Los Angeles R. R., 273 U. S. 299, 312-313 (1927); Crowell v. Benson, 285 U. S. 22, 48 (1932); *Ex parte* Hidekuni Iwata, 219 Fed. 610, 613 (S. D. Calif. 1915), *aff'd per. cur.*, 244 U. S. 643 (1917).

[23] See REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, *supra* note 19, 404-410. See also Brown, *supra* note 21, making an excellent argument for the adoption of this type of procedure in public utility rate cases and carefully analyzing the arguments pro and con.

Emergency Price Control Act and the procedural regulations of the Administrator is to encourage the exchange of written evidence wherever this is administratively feasible and where it will not interfere with the essence of a fair hearing.[24] Such a policy is essential to the success of the emergency price control program. Under present conditions it would be virtually impossible to assemble a staff of competent experts large enough both to participate in lengthy oral hearings, and also to accomplish the investigations and study necessarily incident to the issuance and continuous reconsideration of price regulations.

The procedural regulations issued by the Administrator afford the mechanism for determining when oral testimony or some form of compulsory process is essential to a fair hearing. They provide that the protestant must file, in conjunction with his protest, "affidavits setting forth in full all the evidence, the presentation of which is subject to the control of the protestant, upon which the protestant relies in support of the facts alleged in the protest"[25] and in addition, that he may file a statement in "affidavit form setting forth in detail the nature and source of any further evidence not subject to his control, upon which he believes he can rely in support of the facts alleged in his protest."[26] On the basis of these statements the Administrator will determine whether full oral hearing or some method of compulsory process should be afforded.[27] The Administrator may also incorporate in the protest record such written evidence, in the form of affidavits, or otherwise as he deems appropriate to support the regulation under attack.[28] Copies of any such written evidence incorporated in the record without an oral hearing must be served upon the protestant and he must be given a reasonable opportunity to present evidence in rebuttal.[29]

[24] See Act, §203; Proced. Reg. No. 1, §§1300.15, 1300.21.

[25] Proced. Reg. No. 1, §1300.15(a). [26] Proced. Reg. No. 1, §1300.15(b).

[27] Proced. Reg. No. 1, §1300.23. Due process does not require that parties to an administrative proceeding have the aid of compulsory process. See Low Wah Suey v. Backus, 225 U. S. 460 (1912), upholding a deportation statute which did not authorize the issuance of process to compel the attendance of witnesses for the alien. See also Missouri *ex. rel.* Hurwitz v. North, 271 U. S. 40 (1926), discussed in Freund, *Due Process in the Revocation of Licenses* (1927) 21 ILL. L. REV. 493; and Brinkley v. Hassig, 130 Kan. 874, 289 Pac. 64 (1930). The only case to the contrary is Jewell v. McCann, 95 Ohio St. 191, 116 N. E. 42 (1917), announcing the decision *per curiam* but referring to no authorities and giving no reasons for the result.

If provision is made for the issuance of subpenas, a party to an administrative proceeding is not entitled to procure their issuance as a matter of right. See generally, Note, *Subpoenas and Due Process in Administrative Hearings* (1940) 53 HARV. L. REV. 842. Defendants are not universally entitled to the issuance of subpenas as a matter of right in either criminal or civil proceedings. See Goldsby v. U. S., 160 U. S. 70 (1895); Owens v. State, 169 Miss. 141, 152 So. 651 (1934); Note (1922) 21 A. L. R. 335, supplemented (1927) 48 A. L. R. 947. But see Coney Island Dairy Products Corp. v. Baldwin, 243 App. Div. 178, 276 N. Y. Supp. 682 (1935), annulling a revocation of a milk dealer's license solely on account of the commissioner's refusal to furnish subpenas ordering the appearance of the witnesses on the dealer's behalf. This decision is clearly inconsistent with the rule in judicial proceedings. It is common practice for administrative agencies to exercise discretion in the issuance of subpenas. See *e.g.*, SEC, Rules of Practice, Rule V (f); NLRB, Rules and Regulations, Art. II, §21. These rules have been judicially approved. See Inland Steel Co. v. N. L. R. B., 109 F. (2d) 9 (C. C. A. 7th, 1940); North Whittier Heights Citrus Ass'n v. N. L. R. B., 109 F. (2d) 76 (C. C. A. 9th, 1940), *cert. denied*, 310 U. S. 632 (1940). However, if the refusal of subpenas results in depriving the party of significant evidence, the court, on review, may remand for the taking of testimony. See N. L. R. B. v. Ed. Friedrich, Inc., 116 F. (2d) 888 (C. C. A. 5th, 1940).

[28] Proced. Reg. No. 1, §§1300.20 and 1300.21. [29] *Ibid.*

Thus the procedural regulations carefully safeguard the right of the protestant to be apprised of, and to have an opportunity to meet, the evidence upon which the Administrator relies.

A substantial part of the record upon which the Administrator relies to support any regulation may be materials of which he takes "official notice."[30] It is clear that in using the term "official notice" the statute contemplates something more than those matters of common knowledge which ordinarily come within the scope of judicial notice. This is made explicit by the provision that the "Administrator may take official notice of economic data and other facts, including facts found by him as a result of action under Section 202."[31] (§203(b)) Thus the Administrator may incorporate in the record of the protest proceedings the result of studies and investigations made by his staff, as well as reports or other information filed with the Office of Price Administration in accordance with requests or requirements issued under Section 202.[32] This is not an entirely novel use of the concept of "official notice." Other administrative agencies have adopted the practice of incorporating into the record of particular proceedings reports filed in accordance with general information gathering requirements, or facts established in other proceedings.[33] The further development of this practice is quite generally regarded as desirable, especially where the

[30] See generally, on the subject of "official notice," Gellhorn, *Official Notice in Administrative Adjudication* (1941) 20 TEX. L. REV. 131; Brown, *supra* note 21; Faris, *Judicial Notice by Administrative Bodies* (1928) 4 IND. L. J. 167; Note, *Judicial Notice by Administrative Tribunals* (1934) 44 YALE L. J. 355.

[31] By §202 of the Act the Administrator is authorized to make such studies and investigations and to obtain such information as he deems necessary or proper to assist him in the performance of his duties. He is empowered to issue subpenas requiring appearance and testimony of any person, or the production of any documents. On application of the Administrator, the district courts may order compliance with these subpenas and punish failure to comply with such orders as contempt of the court. In addition, the Administrator may, by regulation, order or subpena require any person in the business of dealing in any commodity or in the business of renting housing accommodations to furnish information, or keep records and make reports. These investigatory powers are not confined in their use to protest proceedings. See §5 of the Lever Act, 40 STAT. 276 (1917), which also provided for extensive investigatory powers. The necessity for such provisions as an aid to effective price control is aptly described in U. S. v. Mulligan, 268 Fed. 893, 897 (N. D. N. Y. 1920). See also Bituminous Coal Act of 1937, 50 STAT. 77, 88, 89 (1937), 15 U. S. C. A. §§833, 840, 844; Fair Labor Standards Act, 52 STAT. 1065, 1066 (1938) 29 U. S. C. A. §§209, 211. Exercise of these powers would appear to create no serious constitutional problems. See Electric Bond & Share Co. v. Securities Exchange Comm'n, 303 U. S. 419 (1938); American Tel. & Tel. Co. v. U. S. 299 U. S. 232 (1936); Smith v. Interstate Commerce Comm'n, 245 U. S. 33 (1917); *cf.* Harriman v. Interstate Commerce Comm'n, 211 U. S. 407 (1908); Federal Trade Comm'n v. American Tobacco Co., 264 U. S. 298 (1924).

[32] Section 202(h) prohibits the Administrator from publishing or disclosing any information obtained under the Act which he deems confidential, or as to which a request for confidential treatment is made by the person furnishing the information, unless the Administrator determines that the withholding thereof is contrary to the interest of national defense and security. Clearly the exception would authorize disclosure of "confidential information" if necessary to provide a "fair hearing." *Cf.* Powhatan Mining Co. v. Ickes, 118 F. (2d) 105 (C. C. A. 6th, 1941), reaching a similar result despite a flat statutory prohibition of disclosure. See also *In re* Culhane, 269 Mich. 68, 256 N. W. 807 (1934); Werner v. Crippen, 245 App. Div. 363, 282 N. Y. Supp. 722 (1935); with which compare Bank of America v. Douglas, 105 F. (2d) 100 (App. D. C. 1939). The same result would be reached if such information were necessary to sustain a regulation or order against attack as arbitrary or capricious.

[33] *Cf.* Railroad Commission v. McDonald, 90 S. W. (2d) 581 (Tex. Civ. App. 1936); In the Matter of Consumers Power Co., 6 S. E. C. 444 (1939). See also REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, *supra* note 19, at 398-403.

matter involved is complicated economic data, not easily susceptible of proof by ordinary methods.[34]

Constitutional limitations upon the use of "official notice" are essentially similar to the restrictions imposed upon the use of written evidence. The courts have disapproved of this device only where it has resulted in a failure by the administrative agency to give timely advice to the parties as to the information upon which the administrative action is based.[35] The procedural regulations and the statute both provide adequate protection against this danger. In most, if not all, instances, facts of which the Administrator takes "official notice" will be included in the statement of considerations or in supplementary statements incorporated in the record of the protest proceedings and served upon the parties, with full opportunity for rebuttal. If, in the opinion disposing of a protest, the Administrator should refer for the first time to additional facts as a basis for his action, the provisions with regard to the admissibility of new evidence either before the Administrator or the Emergency Court of Appeals would prevent this procedure from amounting to a denial of due process.[36]

Conceivably other constitutional objections to particular protest proceedings may

[34] See *id.* at 71-73, and articles cited, *supra* note 30. See GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS (1941) 82-99.

[35] See U. S. and Interstate Commerce Comm'n v. Abilene & Southern R. R., 265 U. S. 274 (1924), where the Court set aside an order of the Interstate Commerce Commission. At the Commission hearing the examiner had announced that "No doubt it will be necessary to refer to the annual reports of all these carriers." This was the only notification to the carriers of the intention of the Commission to rely on certain facts in the annual reports. At p. 289 the Court said, "The objection to the use of the data contained in the annual reports is not lack of authenticity or untrustworthiness. It is that the carriers were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made. The requirement that in an adversary proceeding specific reference be made, is essential to the preservation of the substantial rights of the parties."

Similarly in Ohio Bell Telephone Co. v. Public Utilities Comm'n, 301 U. S. 292, 302-303 (1937), the Court condemned a rate order issued by the Commission after consideration of certain standard price indices not included in the record, saying, "When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here. The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, 'I looked at the statistics in the Library of Congress, and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms."

Neither of these cases casts any doubt on the validity of the procedure under the Price Control Act, in view of the elaborate machinery provided for notice to a protestant of all the facts on which the Administrator relies.

[36] Section 204(a) of the Act provides "If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court." This would enable a protestant who learned that evidence was relied upon by the Administrator only from the opinion issued on denial of the protest to rebut such evidence if he chose.

be raised on the basis of the *Morgan* cases.[37] Reference may be made, for example, to the doctrine that the Government's position must be fully disclosed in advance of administrative decision[38] or to the doctrine that "the one who decides must hear."[39] Full discussion of such objections must of necessity await the particular proceedings in which they arise. Suffice it to say here that the statutory provisions and the procedural regulations indicate that the essential requirements of the *Morgan* cases will be satisfied. However, it may also be pointed out that logically those requirements have little, if any, application to protest proceedings, since they are not "adversary" or "quasi-judicial" in the sense that those terms were used by Chief Justice Hughes in the first and second *Morgan* cases.[40] In so far as they have an administrative significance, they are designed for reconsideration of the original regulation and are as much legislative in character as pre-issuance hearings. The requirements of procedural due process are applicable only to the extent that the record in the protest proceedings is also the record on which the Emergency Court must determine the validity of the regulation. For this purpose, as elaborated hereafter, the provisions

[37] Morgan v. U. S., 298 U. S. 468 (1936), 304 U. S. 1 (1938), rehearing denied, 304 U. S. 23 (1938), 307 U. S. 183 (1939), 313 U. S. 409 (1941).

[38] It has already been demonstrated that the procedure outlined by the statute and regulations provides for ample notice of the evidence relied upon by the Administrator in issuing any regulations or orders under §2, or in acting on any protest.

[39] The doctrine that "the one who decides must hear" cannot be applied literally. It does not preclude use of assistants by administrative officers. See Morgan v. U. S., 298 U. S. 468, 481 (1936), and *id.* 313 U. S. 409, 422 (1941). *Cf.* U. S. Trust Co. v. Blake, 234 N. Y. 273, 137 N. E. 327 (1922). Whether this requirement has been complied with can only be determined on the basis of the facts in a particular case.

Of considerable importance in this connection is the authorization to the Administrator of the general power of sub-delegation. Section 201(b) provides that the Administrator "or any duly authorized representative may exercise any or all of his powers in any place." It is clear from the legislative history of the Act that this was intended as a grant of authority to sub-delegate. See *Senate Report* 20, where in commenting on §201, it is said, "He [the Administrator] may perform his duties through such employees or agencies by delegating to them any of the powers given to him by the bill." Despite a similarity in language, differences in legislative intent, as evidenced in the Congressional history, serve to distinguish the Emergency Price Control Act from the Fair Labor Standards Act, 52 STAT. 1060 (1938), 29 U. S. C. A. §201. Therefore, the decision in Cudahy Packing Co. of Louisiana v. Holland, 62 Sup. Ct. 651 (1942), holding invalid a delegation by the Administrator under that Act, of the power to sign and issue subpenas to a regional director, is not controlling so far as construction of the Emergency Price Control Act is concerned. There seems to be little doubt of the validity of a legislative grant of a general power of sub-delegation. Generally, see GELLHORN, ADMINISTRATIVE LAW—CASES AND COMMENTS (1940) 315-323.

[40] 298 U. S. 468 (1936); 304 U. S. 1 (1938). Whether the hearing on a protest proceeding is oral or written it will take place after the issuance of a general regulation. The general applicability of regulations or orders issued under §2 of the Act demonstrates that they are not directed against specific parties as were the proceedings in the Morgan cases. This distinction may require qualification in instances where general classifications contained in price regulations are being applied to particular individuals. See note 14, *supra.*

A further distinction is indicated by the statement of the Court in the first Morgan case that, "Congress has required the Secretary to determine, as a condition of his action, that the existing rates are or will be 'unjust, unreasonable, or discriminatory.' If and when he so finds, he may 'determine and prescribe' what shall be the just and reasonable rate, or the maximum or minimum rate, thereafter to be charged. That duty is widely different from ordinary executive action. It is a duty which carries with it fundamental procedural requirements." 298 U. S. 468, 479-480 (1936). No such requirement is imposed by this act. The statement of considerations which must accompany any regulation or order issued under §2 must be distinguished from the "findings of fact" frequently required of quasi-judicial agencies. The former is intended to show the basis for the administrative action in the light of the standards set up in §§1 and 2, but no particular facts need be found to exist to justify the imposition of a maximum price.

authorizing the court to require the taking of additional evidence and giving it ultimate control over the record, are sufficient to assure the protestant of an adequate judicial hearing on the validity of the regulations.

II

The provisions for judicial review under the statute are to be found in Section 204, which creates the Emergency Court of Appeals and gives it exclusive jurisdiction, subject to writ of certiorari from the Supreme Court, to determine the validity of Section 2 regulations and orders.[41] This court is to consist of three or more federal district or circuit judges, designated by the Chief Justice of the United States. (§204(c)) The Emergency Court is authorized to sit in divisions of three or more members and each division may render judgment as the judgment of the court. At present writing, Chief Justice Stone has already designated a court of three judges, who will presumably convene for the purpose of hearing particular cases as the necessity arises.[42]

The Act provides that "any person who is aggrieved[43] by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, . . . praying that the regulation, order or price schedule protested be enjoined or set aside in whole or in part." (§204(a)) When this complaint is served upon the Administrator, he must certify and file with the court a transcript of those portions of the protest record material to the complaint.[44] The court is directed to consider only objections advanced in the protest and only evidence contained in the transcript.[45] (§204(a)) However, the court may also require the

[41] The exclusive jurisdiction of the Emergency Court of Appeals does not extend to regulations or orders of the Administrator issued under the provisions of §202. The protest procedure is expressly limited to regulations or orders under §2 and price schedules effective under the provisions of §206. §203(a). The jurisdiction of the Emergency Court of Appeals is specifically limited to consideration of complaints by persons aggrieved by denial of a protest.

[42] On March 2, 1942, Chief Justice Stone named the following: Justice Fred M. Vinson (App. D. C.), Chief Judge; Judge Calvert Magruder (C. C. A. 1st); Judge Albert B. Maris (C. C. A. 3rd). The Chief Judge is authorized to divide the court into divisions. The court is empowered to prescribe its own rules of procedure, hire a clerk and to hold sessions at such places as it may select. §204(c).

[43] The class of persons entitled to judicial review of administrative action has been similarly limited to those "aggrieved" in the Federal Communications Act, 48 STAT. 1093 (1934), 47 U. S. C. A. §402(b)(2), and in the Natural Gas Act, 52 STAT. 821 (1938), 15 U. S. C. A. §717. These provisions have been judicially construed to require one who sought to attack administrative action to show that it interfered with some substantial right or interest accruing to him. See Federal Communications Comm'n v. Sanders Bros. Radio Station, 309 U. S. 470 (1940); Yankee Network v. Federal Communications Comm'n, 107 F. (2d) 212, 215 (App. D. C., 1939); Arkansas-Louisiana Gas Co. v. Federal Power Comm'n, 113 F. (2d) 281, 284 (C. C. A. 5th, 1940). Inasmuch as a protest must precede complaint to the Emergency Court of Appeals, a further limitation on the class of persons entitled to judicial review is found in the administrative interpretation of §203(a). In Proced. Reg. No. 1, §1300.9, persons entitled to file protests are defined as those of whom a regulation requires or prohibits action.

[44] See Proced. Reg. No. 1, §1300.34, 7 FED. REG. 971, 974 (1942): "The transcript for judicial review shall include: (a) the maximum price regulation against a provision of which the protest was filed; (b) the statement of considerations accompanying such regulation; (c) the protest; (d) a statement setting forth, as far as practicable, the economic data and other facts of which the Administrator has taken official notice; and (e) such other portions of the proceedings in connection with the protest as are material under the complaint."

[45] See *Senate Hearings* 251.

inclusion in the record of evidence which was rejected by the Administrator and evidence which could not reasonably have been offered to the Administrator or included by him in the transcript. Such evidence may be taken by the Administrator in connection with reconsideration of the protest, or at his request, may be presented directly to the court.[46] In disposing of the case, the court may dismiss the complaint, set aside the regulation, order or price schedule, in whole or in part, or remand the proceeding to the Administrator. (§204(d))

Although the proceeding in the Emergency Court is in form an original one, it is in substance a review of administrative action. In this respect the procedure is fundamentally similar to review of several other federal administrative agencies through injunction suits in the district courts.[47] Since a fundamental purpose of the protest procedure is to provide an opportunity for administrative reconsideration of the regulation, order or price schedule, the requirement that the court consider only objections presented to the Administrator merely codifies the usual rule of exhaustion of administrative remedies.[48] The provision that the record before the court should consist primarily of the record before the Administrator is also clearly valid, for it can hardly be contended that a judicial trial *de novo* is a constitutional requisite for the review of regulations or orders issued under the Act.[49]

The Act formulates a standard for the proper scope of judicial review by providing that "No . . . regulation, order, or price schedule shall be enjoined or set aside, in

[46] See note 36, *supra*.

[47] Compare the practice under the Urgent Deficiencies Act, where the practice of limiting the record on review to that made before the administrative agency has been generally followed without express statutory requirements. See Manufacturers Railway v. U. S., 246 U. S. 457, 470, 488, 490 (1918); St. Joseph Stock Yards Co. v. U. S., 298 U. S. 38 (1936); Morgan v. U. S., 298 U. S. 468 (1936); Shields v. Utah Idaho Central R. R, 305 U. S. 177 (1938). But see Baltimore & Ohio R. R. v. U. S., 298 U. S. 349 (1936). Compare judicial review of orders of the Secretary of Agriculture under the Packers and Stockyards Act, 42 STAT. 168 (1921), 7 U. S. C. §217, 49 STAT. 649 (1935), 7 U. S. C. A. §218(c); and of certain orders of the Federal Communications Commission under the Communications Act of 1934, 48 STAT. 1093, 47 U. S. C. A. §402(a). See REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, *supra* note 19, at 83.

[48] "(It is a) long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 50-51 (1938). Statutory limitation of the issues before the Emergency Court of Appeals to those raised by the protest to the Administrator insures compliance with this fundamental requirement. See, generally, Raoul Berger, *Exhaustion of Administrative Remedies* (1939) 48 YALE L. J., 981; Note, *Primary Jurisdiction—Effect of Administrative Remedies on the Jurisdiction of Courts* (1938) 51 HARV. L. REV. 1251; Note, *Administrative Action as a Prerequisite of Judicial Relief* (1935) 35 COL. L. REV. 230; Note, *The Necessity of Exhausting Administrative Remedies before Resorting to Judicial Review* (1927) 27 COL. L. REV. 450; (1939) 87 U. OF PA. L. REV. 475 and 609.

[49] The Supreme Court has carefully limited the requirement of trials *de novo* to the "jurisdictional fact" situation of Crowell v. Benson, 285 U. S. 22 (1932). Despite the apparently conflicting language of that opinion with respect to the imposition of the same requirement to "constitutional facts," both earlier and later decisions show clearly that the rule has never been so applied. Even in St. Joseph Stock Yards Co. v. U. S., 298 U. S. 38 (1936), although requiring an "independent judicial determination" as to the facts in a "confiscation" case, the Court approved the procedure followed by the lower court in limiting its record to that made before the administrative agency. See also Acker v. United States, 298 U. S. 426 (1936); *cf.* South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251 (1940). The "jurisdictional fact" concept would appear to have no application to proceedings under the Emergency Price Control Act so as to require the Emergency Court of Appeals to conduct trials *de novo*.

whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order or price schedule is not in accordance with law, or is arbitrary or capricious." (§204(b)) This is the same standard that would be applied, in the absence of a specific statutory direction, by federal courts in reviewing quasi-legislative action.[50] It should be distinguished from the familiar "substantial evidence" rule, frequently employed in judicial review of administrative action of a quasi-judicial character,[51] and occasionally, by statutory prescription, in review of quasi-legislative action.[52] Where full adversary hearings are required prior to the issuance of administrative regulations or orders, the issue on review may properly be phrased in terms of whether there is "substantial evidence" in the record to justify the order. Under this Act, however, pre-issuance hearings are not required. Although an administrative hearing precedes denial of a protest, the proceeding in the Emergency Court of Appeals is to review the validity of the original regulation or order rather than the denial of the particular protest.[53] Therefore, the Act properly places upon the protestant the burden of offering sufficient proof to overcome the presumption of validity which attaches both to legislative and quasi-legislative action.[54] Clearly the Act does not contemplate the substitution of the independent judgment of the court for that of the Administrator on those questions committed by the statute to the judgment of the Administrator. Rather the function of the court is to determine whether or not the action of the Administrator was arbitrary or capricious in the light of the record before the court, or otherwise in violation of any statutory or constitutional requirements.[55]

[50] See American Tel. & Tel. Co. v. U. S., 299 U. S. 232, 236-237 (1936), where in sustaining an order of the Federal Communications Commission, the Court described the proper standard as follows: "This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers. To show that these have been exceeded in the field of action here involved, it is not enough that the prescribed system of accounts shall appear to be unwise or burdensome or inferior to another. Error or unwisdom is not equivalent to abuse. What has been ordered must appear to be 'so entirely at odds with fundamental principles of correct accounting' . . . as to be the expression of a whim rather than an exercise of judgment." *Cf.* Gray v. Powell, 62 Sup. Ct. 326 (1941); and Railroad Comm'n of Texas v. Rowan & Nichols, 310 U. S. 573 (1940), amended 311 U. S. 614 (1940); *id.* 311 U. S. 570 (1941). See also Swayne & Hoyt Ltd. v. U. S., 300 U. S. 297 (1937); U. S. v. Louisville & Nashville R. R., 235 U. S. 314 (1914).

[51] Securities Exchange Act of 1934, 48 STAT. 901, 15 U. S. C. §78(y); Federal Alcohol Administration Act, 49 STAT. 978 (1935), 27 U. S. C. A. §204(h); Federal Power Act, 49 STAT. 860 (1935), 16 U. S. C. A. §825(l) (1941). The "substantial evidence" test has been applied even in the absence of statutory requirements. See Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 229 (1938). See also REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, *supra* note 19, at 89.

[52] See Fair Labor Standards Act of 1938, 52 STAT. 1065 (1938), 29 U. S. C. A. §210; Bituminous Coal Act of 1937, 50 STAT. 85 (1937), 15 U. S. C. A. §836(b).

[53] Note that by the provisions of §204(b) of the Act, the Emergency Court of Appeals can set aside or enjoin a regulation only if "the complainant establishes to the satisfaction of the court that the regulation, order or price schedule, is not in accordance with law, or is arbitrary or capricious."

[54] See South Carolina Highway Dep't v. Barnwell Brothers, 303 U. S. 177, 191 (1938), where the Court considered the nature of the judicial function in determining the validity of legislative action. See also American Tel. & Tel. Co. v. U. S., 299 U. S. 232 (1936), applying the same test to quasi-legislative action.

[55] The legislative history of the Act demonstrates clearly that this is the Congressional intent. See *Senate Report* 7-8, where it is said that: "Although the Court may not substitute its judgment for that of the Administrator on questions of fact, it may examine the entire record before the Administrator to determine whether he has acted in accordance with the statute, whether the procedure that he has followed

Even as to constitutional objections that may be raised in the Emergency Court of Appeals to particular regulations or orders, the standard of review prescribed is perfectly appropriate. Any argument to the contrary could be based only upon the much criticized, and frequently ignored, *Ben Avon* doctrine.[56] However, the Supreme Court has steadfastly refused to apply the *Ben Avon* rule in any save public utility rate cases where the charge of confiscation has been made.[57] In the case of a general price regulation, as in the case of other general regulations, there is no comparable issue of confiscation.[58] In *Railroad Commission of Texas v. Rowan & Nichols* the lower court was severely criticized for making an independent determination of the merits of the claim that an oil proration order was confiscatory; in upholding the order, the Supreme Court applied exactly the same standard of review as that prescribed by the Price Control Act.[59] Furthermore, the recent decision in *Federal Power Commission v. Natural Gas Pipeline Company of America* is authority for ignoring the *Ben Avon* doctrine even in public utility rate cases. There the Court, having before it an order of the Federal Power Commission challenged as confiscatory, indicated that it considered itself bound by the statutory prescription of the "substantial evidence" rule and applied that standard in sustaining the Commission's order.[60] In the light of

is in accordance with accepted standards of due process of law, and whether he has exercised a reasonable judgment on questions committed to his discretion." See also *Senate Hearings* 251-252; *House Hearings* 406.

[56] Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287 (1920). The state public utility act had been construed as limiting the power of a state court on review of a rate order to an inquiry as to whether the order was a reasonable exercise of administrative discretion. Borough of Ben Avon v. Ohio Valley Water Co., 260 Pa. 289, 103 Atl. 744 (1918). The Supreme Court ruled that due process required an "independent judicial determination" of both facts and law since the company claimed that the order would result in confiscation of its property. There is a tremendous amount of periodical material critical of the case. A few of the articles are: Landis, *Administrative Policies and the Courts* (1938) 47 YALE L. J. 519; Freund, *The Right to a Judicial Review in Rate Controversies* (1921) 27 W. VA. L. Q. 207; Albertsworth, *Judicial Review of Administrative Action by the Federal Supreme Court* (1921) 35 HARV. L. REV. 127. See also St. Joseph Stock Yards Co. v. U. S., 298 U. S. 38 (1935), re-examining and reaffirming the doctrine of the Ben Avon case.

[57] See the concurring opinion in St. Joseph Stock Yard Co. v. U. S., 298 U. S. 38, 73 (1935), and cases there cited. Mr. Justice Brandeis demonstrated that the Court has followed no rigid rule in the application of the doctrine of "constitutional facts." The factors which the Court has relied upon to avoid the rule of the Ben Avon case and the decisions themselves clearly demonstrate that review of administrative action properly is limited to determining the reasonableness of the regulation.

[58] See Freund, *The Emergency Price Control Act of 1942: Constitutional Issues, infra,* at 83.

[59] 310 U. S. 573 (1940); amended, 311 U. S. 614 (1940); *id.* 311 U. S. 570 (1941). The decision of the lower court was characterized as being "dominated by their own conception of the fairness and reasonableness of the challenged order." This, the Court said, required a "fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted." 310 U. S. 573, 580-581. Clearly the Court denied that there was any necessity for independent judicial determination in every case in which it is claimed that confiscation results from administrative action. In view of the fact that the doctrine of "constitutional facts" of the Ben Avon and St. Joseph Stock Yards Co. cases springs from limitations on administrative action imposed by the due process clause, differences in judicial review based on types or degrees of confiscation are illogical. Reconciliation, therefore, of the Ben Avon and Rowan & Nichols cases seems impossible.

[60] See Federal Power Comm'n v. Natural Gas Pipe Line Co., 62 Sup. Ct. 736 (1942). See particularly the Court's treatment of the issue as to "Rate of Return." *Id.* at 747-748. The Court said: "The Commission found that '6½ per cent is a fair annual rate of return upon the rate base allowed,' which it had characterized as 'a generous allowance.' The courts are required to accept the Commission's findings if they are supported by substantial evidence. . . . We cannot say on this record that the Commission was

these decisions, there is no room for doubt as to the validity of the scope of review provided for regulations, orders and price schedules under the Price Control Act.

The Emergency Court has powers sufficient to correct procedural as well as substantive errors in the administration of the statute. Errors attendant upon the original issuance of the regulation or order could, of course, be asserted in the protest and again in the complaint initiating proceedings in the Emergency Court. Any alleged inadequacy in the protest proceedings could be cured by application to the court for leave to introduce additional evidence and by the exercise of the powers of the court to remand the proceedings. Errors in the protest procedure would not, however, be grounds for setting aside the regulation or order being protested. They would merely afford the basis for an order of the court setting aside the denial of the protest and directing the Administrator to proceed in accordance with the opinion of the court.[61] In so doing the court could not direct the Administrator as to how he should exercise his administrative discretion, for it is clearly intended that the Emergency Court should act solely as a constitutional, rather than as a legislative or administrative, court.[62] It could, however, require the reopening and the completion of the protest proceedings so as to assure an adequate basis for judicial determination of the validity of the regulation or order under attack.[63]

The most significant limitations on the powers of the Emergency Court are those prohibiting it from issuing temporary injunctions and staying the effectiveness of its final judgments pending opportunity for review in the Supreme Court of the United States.[64] These provisions, like the provisions for exclusive jurisdiction, are essential

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bound to allow a higher rate." The order reviewed here was an interim one having been issued on the basis of the company's evidence alone. The issues, therefore, were confined to those generally characterized as "questions of law." Denial of an "independent judicial determination" of such questions is the strongest possible refutation of the doctrine of the Ben Avon case.

[61] The court has no power to enjoin or set aside a regulation, order or price schedule "unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious." §204(b). In addition to this power, however, the court may "remand the proceedings." §204(a). It is clear that this power may be exercised to correct procedural defects which the court should consider. See *Senate Report* 8.

[62] Section 204(b) provides that, "The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court." Section 204(c) limits the power of the Emergency Court by providing that, "the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206."

[63] See Keller v. Potomac Electric Power Co., 261 U. S. 428 (1923); Federal Radio Comm'n v. General Electric Co., 281 U. S. 464 (1930). *Cf.* Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U. S. 266 (1933). Any other construction would create considerable doubt as to the validity of the provision for review of orders and judgments of the Emergency Court of Appeals by the Supreme Court.

[64] See the discussion in Federal Communications Comm'n v. Pottsville Broadcasting Co., 309 U. S. 134 (1940), of the proper relationship between an administrative agency and a reviewing court in an analogous situation. That case arose from the effort of an applicant to compel the Commission to give him separate consideration. After the original order denying his application had been set aside by the reviewing court, the agency consolidated three applications for consideration on a comparative basis. The Court held

to the continuity and therefore to the effectiveness of price control. If a price regulation were suspended during litigation, a final decision of the Emergency Court or of the Supreme Court sustaining its validity would be indeed a Pyrrhic victory. When the pressures of a seller's market are as great as they are today, price rises in one commodity are quickly reflected elsewhere in the economy. In the battle against inflation, ground once lost can seldom be regained. If preliminary injunctions were to issue in judicial proceedings, the statutory provisions designed to permit expeditious administrative action would be rendered largely nugatory.

These considerations would doubtless have sufficed, in most cases, to dissuade the court from issuing preliminary injunctions even if there were no such statutory prohibition, for it is familiar doctrine that a preliminary injunction restraining governmental action will not be issued if the threatened private injury is outweighed by the possible public injury involved.[65] The same considerations, buttressed by the deliberate Congressional determination that the public interest in preventing inflation outweighs any hardship that may temporarily be imposed upon individuals, should be sufficient to dispose of the contention that the statutory restrictions upon the issuance of preliminary injunctions constitute a denial of due process.[66]

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that there was no judicial power to interfere in the administrative enforcement of the legislative policy. See also Federal Power Comm'n v. Pacific Power & Light Co., 307 U. S. 156, 160 (1939); Fly v. Heitmeyer, 309 U. S. 146 (1940).

[65] See Marconi Wireless Tel. Co. v. Simon, 227 Fed. 906 (S. D. N. Y. 1915); Dryfoos v. Edwards, 284 Fed. 596 (S. D. N. Y. 1919), *aff'd*, 251 U. S. 264 (1920); Tennessee Valley Authority v. Tennessee Electric Power Co., 90 F. (2d) 885 (C. C. A. 6th, 1937). Mr. Justice Holmes approved this principle in Block v. Hirsh, 256 U. S. 135 (1921), sustaining the World War I District of Columbia rent control law despite the fact that tenants remained in possession at existing rentals pending review. Of particular pertinence is the concurring opinion of Mr. Justice Frankfurter in Mayo v. Lakeland Highlands Canning Co., 309 U. S. 310, 319 (1940), in which he denounced the issuance of a temporary injunction to restrain enforcement of the Florida Citrus Fruit Price Control Act.

[66] In principle, the Court approved legislative prohibition of interlocutory injunctions in Scripps-Howard v. Federal Communications Comm'n, 62 Sup. Ct. 857 (1942). After examining the legislative history and the enforcement practice the Court refused to sustain the Government's contention that the Communications Act of 1934 prohibited stays of the Commission's orders pending judicial review. Significantly enough the Court referred to the Emergency Price Control Act as having this effect and said, at p. 883, "Where Congress wished to deprive the courts of this historic power, it knew how to use apt words—only once has it done so and in a statute born of the exigencies of war." The same thing was done in another war measure, the National Prohibition Act of 1919, 41 STAT. 311, 27 U. S. C. §21. This limitation on judicial interference with revocations of alcohol dealers licenses pending review was enforced in a number of cases. See, *e.g.*, Sparton Mfg. Co. v. Campbell, 40 F. (2d) 745 (E. D. N. Y. 1930).

Cf. Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290 (1923); Pacific Tel. & Tel. Co. v. Kuykendall, 265 U. S. 196 (1924); Mountain States Power Co. v. Public Service Comm'n, 299 U. S. 167 (1936). These cases are often cited for the proposition that due process requires that temporary relief be available pending judicial review of claims of confiscation in public utility rate cases. Actually none goes so far. The real basis for these decisions was that there was no statutory bar to the issuance of a temporary injunction in the particular case. Clearly, the public utility rate situation must be distinguished from cases arising under this Act in view of the statutory obligation of the utility to continue its service. *Cf.* §4(d) of the Act expressly denying the existence of any obligation to sell on the part of persons subject to this act.

See also Phillips v. Commissioner of Internal Revenue, 283 U. S. 589 (1931); *cf.* Halsey, Stuart & Co. v. Public Service Commission, 212 Wis. 184, 248 N. W. 458 (1933). But see Porter v. Investors Syndicate, 286 U. S. 461 (1932). In that case the Court construed a state statute as not prohibiting the issuance of a temporary injunction pending review of the suspension of a broker's license by a Blue Sky Commission although the Court indicated that a contrary construction would have resulted in a denial of due process. The case raises no serious doubt as to the validity of this act in view of the obvious distinction between a "license suspension," directed at a particular individual and based on a quasi-judicial hearing, and the issuance of general price regulations.

The same fundamental issues must be faced in determining the validity of the exclusive jurisdiction provisions of the statute. These provisions prohibit any court other than the Emergency Court of Appeals from considering the validity of any regulation or order issued under Section 2 or any price schedule effective in accordance with the provisions of Section 206. They also prohibit any court from issuing an injunction to restrain the enforcement of the statute upon any ground whatsoever. They do not, however, prevent any court in which proceedings are brought for the enforcement of the statute from considering the constitutional validity of the statute itself, as distinguished from any regulations or orders issued thereunder.[67]

These provisions were designed, in part, to overcome the practical difficulties which would prevent effective price control if the validity of the Section 2 regulations or orders could be questioned in enforcement proceedings. Proof and consideration of complicated economic data underlying the validity of the regulations would result in long-drawn-out trials and make speedy and decisive enforcement impossible.[68] Under such circumstances the expert personnel of the Office of Price Administration would be required to spend a large part of its time testifying in judicial proceedings throughout the country, rather than in making the investigations, studies and analyses which effective administration of the Act requires. Moreover, conflicting decisions with respect to the same regulation would result in unequal application in various parts of the country. Until such conflicts were resolved by the Supreme Court of the United States, effective enforcement would be impossible. In the meanwhile price disparities might have caused fundamental economic dislocations, and individual violations might have developed into general price increases whose inflationary tendencies could never be eradicated.

Constitutional objections to the exclusive jurisdiction provisions could be based only upon the doctrine of the separation of powers or upon the due process clause. In view of the recognized powers of Congress to establish special courts,[69] to limit or withdraw the power to issue injunctions,[70] and to provide for the review of adminis-

[67] The legislative history of the Act requires this construction of the exclusive jurisdiction provision. See *Senate Report* 25. "Of course, the courts in which criminal or civil enforcement proceedings are brought have jurisdiction, concurrently with the Emergency Court, to determine the constitutional validity of the statute itself."

[68] Compare the experience of the courts in the trial of public utility rate cases. The rate proceeding culminating in Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U. S. 292 (1937), consumed 14 years in its various phases. Lindheimer v. Illinois Bell Telephone Co., 292 U. S. 151 (1934), concluded litigation begun in 1921. See discussion by Mr. Justice Brandeis in his concurring opinion in St. Joseph Stock Yards Co. v. U. S., 298 U. S. 38, 73 (1936), discussing the length of time consumed in rate litigation. See also Mr. Justice Black's dissent in McCart v. Indianapolis Water Co., 302 U. S. 419, 435 (1938), which refers to seven other such cases decided by the Supreme Court which had averaged more than three years of litigation.

[69] See, *e.g.*, the Court of Customs Appeals, 36 STAT. 105 (1909), 28 U. S. C. §310; and the Commerce Court, created by 36 STAT. 1146 (1911), and abolished by 38 STAT. 219 (1913), 28 U. S. C. §41(8).

[70] See Kline v. Burke Construction Co., 260 U. S. 226, 234 (1922). "Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution." *Cf.* the Norris-LaGuardia Act, 47 STAT. 71 (1932), 29 U. S. C. §107, limiting the power to issue injunctions in cases arising from labor disputes. See Milk Wagon Drivers' Union Local No. 753 v. Lake Valley Farm Products, Inc., 311 U. S. 91 (1940); Lauf v. Shinner & Co., 303 U. S. 323 (1938);

trative orders in certain courts and their enforcement in others,[71] the separation of powers argument seems to be entirely lacking in substance. It should also be noted that the "inherent powers" of courts to determine the validity of statutes which they are asked to enforce are in no way restricted by the exclusive jurisdiction provisions.[72]

The contention that the exclusive jurisdiction provisions constitute a denial of due process to the defendant in civil or criminal enforcement proceedings goes to the heart of the procedure provided by the statute. It squarely poses the question of whether it is reasonable for Congress to require that administrative regulations be obeyed while their validity is being tested. The necessity for this provision is substantially the same as the necessity for the provision prohibiting preliminary injunctions. The public interest in preventing inflation is so urgent that it does not permit of delays in the enforcement of price or rent regulations or gaps in their application. In such circumstances, due process does not require that persons subject to price or rent regulations be given an opportunity to gamble on their invalidity.[73] There is here no attempt to preclude a judicial determination by establishing unusually heavy penalties.[74] On the contrary, the path has been cleared for a speedy and complete judicial review without any of the risks of disobedience. The exclusive jurisdiction provisions require only that this path be followed. Whether or not such provisions would be appropriate in a peace-time price control measure, with no real threat of inflation impending, is now an academic question. There is no doubt that the exclusive jurisdiction provisions are both appropriate and essential to the effective operation of the Emergency Price Control Act.

Levering & Garrigues Co. v. Morrin, 71 F. (2d) 284 (C. C. A. 2d, 1934), *cert. denied*, 293 U. S. 595 (1934). Compare the Johnson Act, 48 STAT. 775 (1934), 28 U. S. C. §41(1) (1934), which deprives district courts of jurisdiction over rate orders of state public utility commissions when there is a plain and speedy remedy afforded in the state courts. Injunctions to stay proceeding in state courts are prohibited by 36 STAT. 1162 (1911), 28 U. S. C. §379 (1934), construed in Toucey v. New York Life Insurance Co., 314 U. S. 118 (1941). Since 1867, suits to restrain assessment or collection of taxes have been prohibited. REV. STAT. §3224 (1875), 26 U. S. C. §1543. See 50 STAT. 752 (1937), 28 U. S. C. A. §380(a), which limits power to enjoin enforcement of federal statutes on claim of unconstitutionality to three-judge courts. See also 36 STAT. 557 (1910), 28 U. S. C. §380, imposing the same limitation with respect to state legislative and administrative action.

[71] *Cf.* Fair Labor Standards Act of 1938, 52 STAT. 1065, 29 U. S. C. A. §210; Federal Trade Commission Act, 38 STAT. 719 (1914), 15 U. S. C. §45, Agricultural Adjustment Act of 1938, 52 STAT. 64, 7 U. S. C. A. §1367. See also review of orders of the Interstate Commerce Commission by the procedure set up in the Urgent Deficiencies Act, 38 STAT. 220 (1913), 28 U. S. C. §47. It also is used for review, *inter alia*, of orders of the Secretary of Agriculture under the Packers and Stockyards Act, 42 STAT. 168 (1921), 7 U. S. C. §217, 49 STAT. 649 (1935), 7 U. S. C. A. §218(c); and of certain orders of the Federal Communications Commission under the Communications Act of 1934, 48 STAT. 1093, 47 U. S. C. A. §402(a).

[72] See note 67, *supra*.

[73] See Bradley v. City of Richmond, 227 U. S. 477 (1913); Bianchi v. Morales, 262 U. S. 170, 171 (1923); *cf.* U. S. v. R. L. Dixon & Bro., 36 F. Supp. 147 (N. D. Tex. 1940) (a defendant in an action for penalties under the Agricultural Adjustment Act was denied a hearing on the question of the validity of the quota imposed since he had not contested it in the manner prescribed by the Act); U. S. v. Piuma, 40 F. Supp. 119 (S. D. Calif. 1941) (same result in action for penalties for violation of cease and desist order of Federal Trade Commission); Inghram v. Union Stock Yards Co., 64 F. (2d) 390 (C. C. A. 8th, 1933) (same result in action to collect charges approved by Secretary of Agriculture under Packers and Stockyards Act); U. S. v. Vacuum Oil Co., 158 Fed. 536 (W. D. N. Y. 1908) (same result in prosecution of shipper for receiving rebates from carrier who sought to attack reasonableness of violated rate).

[74] *Cf. Ex parte* Young, 209 U. S. 123 (1908).

THE EMERGENCY PRICE CONTROL ACT OF 1942: CONSTITUTIONAL ISSUES

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Constitutional law, in the realm of national power, is compounded of equal parts of economics and procedure. On questions of basic power, Holmes' man of the future, the "man of statistics and the master of economics,"[1] has become the man of the present. On questions of delegation of power, the important inquiry is whether safeguards have been set up which tend to assure reasoned and not arbitrary action. This article, as I understand, is to be flanked by others concerned with the economic bases of the Act and with its procedural provisions. Thus my essay has been written for me. It only remains to show that this is so.

POWER OF CONGRESS

The taking of measures to wage war successfully and to survive the war was a power as obviously conferred on the national government as it was dearly bought. In the exuberance of dicta the power has been painted with bold strokes. Thus in *United States v. Macintosh,* Mr. Justice Sutherland said:[2]

> From its very nature, the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law. In the words of John Quincy Adams,—"This power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life." To the end that war may not result in defeat, freedom of speech may, by act of Congress, be curtailed or denied so that the morale of the people and the spirit of the army may not be broken by seditious utterances; freedom of the press curtailed to preserve our military plans and movements from the knowledge of the enemy; deserters and spies put to death without indictment or trial by jury; ships and supplies requisitioned; property of alien enemies, theretofore under the protection of the Constitution, seized without process and converted to the public use without compensation and without due process of law in the ordinary sense of that term; prices of food and other necessities of life fixed or regulated; railways taken over and operated by the government;

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[1] *The Path of the Law* (1897) 10 HARV. L. REV. 457, 469, reprinted in COLLECTED LEGAL PAPERS (1920) 167, 187. Compare McReynolds, J., dissenting in Steward Machine Co. v. Davis, 301 U. S. 548, 599 (1937), speaking of interference with state powers: ". . . no cloud of words or ostentatious parade of irrelevant statistics should be permitted to obscure that fact."

[2] 283 U. S. 605, 622 (1931).

and other drastic powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war.

More carefully, in *Home Building & Loan Association v. Blaisdell,* Mr. Chief Justice Hughes said:[3]

> The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions. Thus, the war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme coöperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties.

The war powers are "not limited to victories in the field." They include the power, after the conflict has ended, to "remedy the evils which have arisen from its rise and progress." So said the Supreme Court after the War between the States, and the words were quoted by the Court after the World War in upholding the Prohibition Act passed after the Armistice.[4]

To wage the present war successfully and to survive it requires, in the judgment of Congress and the President, that price inflation be limited. It needs no ghost from either the Revolution or the late World War to tell us of the danger of inflation in wartime. The danger is inherent in the special conditions of our wartime economy, marked as it is by shortages of materials and machines for civilian production, shortages of labor, extraordinary additions to income from government expenditures, and government borrowing which does not siphon off the income and bank deposits of the public. The power to control the inflationary rise of prices is a power to avoid the economic dislocation which would otherwise result. How that dislocation would fetter the conduct of the war and place in jeopardy our post-war stability is well understood. It would involve an enormous increase in the monetary cost of the war; stimulate hoarding of, and speculation in, needed materials; discourage productive undertakings; produce cleavages by the inequitable distribution of burdens; and foredoom a post-war collapse.[5]

The power to prevent economic dislocation which threatens the practical success of basic constitutional functions is not a power peculiar to time of war. The regulation of the value of money by decreasing the gold content of the dollar would have produced enormous dislocation if gold-clause obligations were left to be enforced. To avoid the great and sudden increase that would have ensued in the dollar amount of such debts, they were converted into simple dollar obligations by Act of Congress,

[3] 290 U. S. 398, 426 (1934).

[4] Stewart v. Kahn, 11 Wall. 493, 507 (U. S. 1870), quoted in Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U. S. 146, 161 (1919). An extensive discussion of the war powers is contained in *Hearings before House Committee on Banking and Currency on H. R. 5479, superseded by H. R. 5990, Price Control Bill,* 75th Cong., 1st Sess. (1941), Pt. I, p. 63 *et seq.*

[5] See Message of the President, July 30, 1941, 87 CONG. REC. 6575, H. R. REP. No. 1409, 77th Cong., 1st Sess.

and in view of this context the legislative conversion was sustained.[6] It is true that there the dislocation would have been caused by the enforcement of private agreements which were linked to the exercise of the devaluation power, and which were thus a clog of the most direct kind; but while this factor helped to support the striking down of antecedent contracts, it was not a limiting factor in the decision. The principle is more general, as is shown in the cases which uphold the regulation of intrastate prices where that regulation is necessary to the effective functioning of the interstate price system. The principle is well illustrated in *United States v. Wrightwood Dairy Co.*, decided by the Supreme Court on February 2 of this year.[7] The federal marketing orders for milk sold interstate provide minimum prices to be paid by handlers in accordance with the uses to which the milk is to be put, but producers are to be paid a uniform unit price, irrespective of the uses to which their milk is to be put; each handler pays into a settlement fund, or withdraws from it, the amount by which his payments to producers at the uniform price are less than, or exceed, as the case may be, the total value of the milk he has purchased, measured by the price established for its use classifications. Unregulated handlers doing an intrastate business in fluid milk, having the greatest value, may thus be in a position to pay to producers the uniform minimum price, or more, and enjoy a competitive advantage because they are not required to pay into the settlement fund the differential between the uniform price and the price for that classification. The inclusion of intrastate handlers under the orders was sustained as a concomitant to the regulation of interstate prices. The success of the latter regulation would otherwise have been jeopardized by the dislocation of the market.

At the present time price control is part of a complicated network of economic controls and hence should be considered, for constitutional purposes, as an adjunct to other measures taken under the war, monetary, and fiscal powers.

The system of priorities and allocations of important materials calls for accompanying price control. Such control serves to avert the injustices flowing from a distribution of scarce articles among consumers on the basis of soaring prices in the market. It serves also to avert "bootlegging and other forms of evasion."[8]

Price control is an adjunct also of the power of the Government to requisition and

[6] Norman v. Baltimore and Ohio R. R., 294 U. S. 240 (1935). The nub of the case is indicated by the following colloquy, taken from a transcript of the oral argument:

"The Chief Justice (interposing): Now, I suppose your argument really comes to the point as to the consequences of maintaining the gold clause, with reference to its effect upon the exercise by Congress of the power which you say Congress has?

"Counsel: Yes, your Honor.

"The Chief Justice: That is the real point?

"Counsel: That is the real point. If Congress has the power, then that power cannot be whittled away—

"The Chief Justice: That is the point: Would the power be fettered if the gold clauses are maintained?

"Counsel: It certainly would be; it would be annihilated, as they say in the Legal Tender cases.

"The Chief Justice: Will you just show that in your argument?"

[7] 62 Sup. Ct. 523 (1942).

[8] Baruch, *Priorities—The Synchronizing Force* (1941) 19 HARV. BUS. REV. 261, reprinted in BARUCH, AMERICAN INDUSTRY IN THE WAR (1941) 465, 473; J. H. Martin, *Present Status of Priorities* (1941) 19 HARV. BUS. REV. 271, 284.

to negotiate contracts of purchase. Without price control it is likely that a dual system of prices would prevail, one for the Government, arrived at by agreement or the fixing of fair market value, and another, more speculative, for private purchasers. The United States need not pay prices which reflect artificial enhancement.[9] To allow more profitable private contracts would become intolerable. President Wilson in July, 1917, laid down the principle of a single régime of prices for government and public:[10]

> We must make the prices to the public the same as the prices to the government. Prices mean the same thing everywhere now; they mean the efficiency or the inefficiency of the Nation, whether it is the government that pays them or not. They mean victory or defeat."

Professor Taussig explained the practical necessity which led the Price Fixing Committee to extend price ceilings over private dealings as well as government purchases:[11]

> The process of fixing prices for the government but not for the public necessarily must have entailed sooner or later a rationing of the government orders, each producer to supply his proper quota to the government—a task obviously of great administrative difficulty. Hence, contemporaneously with the establishment of the Price-Fixing Committee itself, and for almost all transactions which came under the jurisdiction of that committee, the principle was followed of fixing a maximum price for all sales, whether to the government or to the public.

It is not suggested that maximum prices may be fixed in order to set the measure of just compensation in the event of requisitioning. They may be fixed in order to keep private prices in line with those paid by the Government, which may be arrived at by agreement or under the threat of economic sanctions only one of which is requisitioning. The question whether a maximum price order will be regarded *ipso facto* as the measure of compensation in case of taking is not essential to the present discussion but may appropriately be noticed. When the domestic market for gold was closed by Congressional and executive action in 1933-34, and access to the foreign markets was stringently restricted, the compensation which the Government was obliged to pay upon requisitioning of gold was held to be limited by the closure of the markets, so that prices abroad and prices paid by the Treasury for newly-mined gold were not to be taken into account.[12] Somewhat similar is the holding that the United States as a contractor may avail itself of the defense of supervening im-

[9] See Highland v. Russell Car & Snow Plow Co., 279 U. S. 253, 262 (1929).

[10] *Address to Mine Operators and Manufacturers*, 55 CONG. REC. 4995, 4996, reprinted in 3 PUBLIC PAPERS OF WOODROW WILSON (ed. Baker and Dodd, 1925) 74, 78.

[11] Taussig, *Price Fixing As Seen By a Price Fixer* (1919) 33 Q. J. ECON. 205, 215. See also Lederer, *War Economics*, in WAR IN OUR TIME (ed. Speier and Kahler, 1939) 206, 215-216: "Two closely related measures which the capitalist state must pursue in its war economy are price control and rationing of consumption. The unavoidable deficiency of private production would in itself increase prices and thus either necessitate greater expenditures by the state or bring about a discrepancy between the prices charged to the public and the prices charged to the government, thus endangering the sufficient provision of the army. Price control avoids this situation and at the same time serves to control profits." See also CLARKSON, INDUSTRIAL AMERICA IN THE WORLD WAR (1923) 165.

[12] Nortz v. U. S., 294 U. S. 317 (1935). See also Perry v. U. S., 294 U. S. 330, 357 (1935), applying the same reasoning to a claim accruing even after the statutory price of gold had been increased.

possibility caused by general wartime orders.[13] In England, it is recounted, under regulations making a general price ceiling the maximum amount to be paid on requisitioning, advice of government counsel prevailed over the humorless nonlegal mind of the civil servant, so that instead of issuing a general price order and a requisitioning order at the same time, the former was studiously announced shortly in advance of the latter.[14] As early as the Revolutionary War the relation of general price-fixing to commandeering of supplies was perceived.[15] It seems likely that a legal corollary of a price order, though not its constitutional basis, will be to establish the value of a commodity which is requisitioned.

As an adjunct to priorities, allocations, government purchasing and requisitioning, price control is particularly appropriate in its application to selected commodities, including raw materials heavily needed for government orders and products made of those materials. Maximum price orders have, in addition, a more generalized function, to fortify the fiscal powers of Congress in a wartime economy. A rising plateau of prices means mounting dollar costs to the Treasury, and consequently mounting borrowing. It becomes increasingly necessary to borrow from the banks rather than from current consumer income, with the result that an inflationary credit base is created.[16] The needs of the Treasury and the maintenance of credit controls come into sharp collision, as was indeed our experience in the late war.[17] An excess-profits tax is not a specific for this danger. The tax will not absorb the full increase in prices, since some profits will not be reached and profits will not increase proportionately with prices where costs (another's prices) are also rising. Furthermore, it is pointed out, "The greater the rise in the price level, the more meaningless become comparisons of wartime profits with prewar, or calculation of invested capital, as a base for determining what are the 'excess' profits."[18]

It is possible to view price control even more broadly, as a regulation of the value of money.[19] The monetary power admittedly carries with it the power to regulate

[13] Horowitz v. U. S., 267 U. S. 458 (1925). Compare also Samuels v. McCurdy, 267 U. S. 188 (1925), holding that no compensation need be given for liquor taken by a state, where its commercial value had been destroyed by prohibitions on sale and transfer: "By valid laws, his property rights have been so far reduced that it would be difficult to measure their value. That which had the qualities of property has, by successive provisions of law in the interest of all, been losing its qualities as property." *Cf.* Note (1942) 55 HARV. L. REV. 427, 531.

[14] See E. M. H. LLOYD, EXPERIMENTS IN STATE CONTROL AT THE WAR OFFICE AND THE MINISTRY OF FOOD (1924) 55. The Regulation was held, without special reference to the provision here mentioned, *ultra vires* under the governing legislation. Newcastle Breweries, Limited v. The King [1920] 1 K. B. 854. But the Regulation appears to have been validated by the Indemnity Act, 1920, 10 & 11 GEO. V, c. 48. Sir Cecil Carr has observed: "Classical writers on English constitutional law almost encourage the executive to break the law in a crisis, because the subsequent validation by statute exhibits such a triumph for the authority of the legislature." CARR, CONCERNING ENGLISH ADMINISTRATIVE LAW (1941) 67.

[15] See NEVINS, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION (1927) 618: "Congress . . . asked the States to authorize the Continental Commissary officers to seize the goods of hoarders and speculators at the legalized prices."

[16] *Cf.* PIGOU, THE POLITICAL ECONOMY OF WAR (rev. ed. 1941) 118.

[17] See HARDY, WARTIME CONTROL OF PRICES (1940) 41-42, 210.

[18] *Id.* at 17.

[19] See Ginsburg, *Legal Aspects of Price Control in the Defense Program* (1941) 27 A. B. A. J. 527, 530; *cf.* Taft, *Price Fixing—A Necessary Evil, id.* 534.

the price of one commodity—gold; the fixing of the gold content of the dollar is, of course, the fixing of a monetary price for gold, which may be made the exclusive market price. Under our gold standard, no other commodity stands in the same relationship to the dollar. It would hardly be contended that the power to regulate the value of the dollar could support the fixing of the value of the dollar in exchange for an isolated commodity, that is, the fixing of the price of that commodity. A more plausible argument can be made that the general level or movement of prices does represent the value of money and so can be validly controlled. The argument would receive support of a more technical sort if it were shown that the gold value of the dollar ought to be adjusted on the basis of the comparative domestic purchasing power of the dollar and that of other national currencies.[20] But it seems unnecessary to pursue the extreme form of the argument. It is unnecessary, that is, to consider whether the power to regulate the value of money would include the power to fix minimum as well as maximum prices, and to do so at a time when the economic pressures of war are less dominant in the markets. The present Act, viewed as a monetary measure, serves to protect the currency against depreciation in markets which the exigencies of war have distorted. It is not without significance that the efforts at price control by the Continental Congress and the states during the Revolution were regarded, in part at least, as measures to save the currency.[21] The monetary powers include the power "to secure a sound and uniform currency for this country."[22] The more comprehensive the price orders in the number and importance of the commodities affected, and the more the prices are keyed to a fairly uniform base period, the more they bear this aspect of protection of the monetary system.

The precise ground on which the validity of a given price order may be rested will perhaps depend on the nature of the commodity. Whether it is controlled by priorities and allocations, the extent to which it is sold in interstate commerce, its importance in the cost of living, are among the factors which may determine the breadth of the ground taken to support constitutionality.

The judicial precedents on wartime price control reflect the general doctrine, current at the time of the late war and following it, that regulation of prices was a species of governmental power to be tested by special criteria under the due-process clause. The wonder, therefore, is not that the Supreme Court should have been cautious in its treatment of the question but rather that the price-fixing power exercised during the war managed to escape the general condemnation. *Highland v. Russell Car & Snow Plow Co.*[23] involved an order of the President under the Lever Act fixing a maximum price for coal sold by dealers. The seller was paid this price but had contracted for a higher price and sued the buyer for the difference. The buyer's defense, resting on the order, was upheld. The Court put emphasis on

[20] *Cf.* CASSEL, THE WORLD'S MONETARY PROBLEMS (1921) 36-38.

[21] See W. G. Brown, *A Continental Congressman: Oliver Ellsworth, 1777-1783* (1905), 10 AM. HIST. REV. 751, 761; 15 J. CONT. CONG. 1289-1290 (Nov. 1779).

[22] Veazie Bank v. Fenno, 8 Wall. 533, 549 (U. S. 1869).

[23] 279 U. S. 253 (1929).

the fact that the coal was to be used in the manufacture of snow plows for railroads and could have been taken by eminent domain, at a figure no higher, for aught that appeared, than that set by the order. This was, to be sure, a roundabout way of upholding the order; but even in constitutional law we may by indirection find directions out. Perhaps the direction had been marked by *Block v. Hirsh*,[24] sustaining the District of Columbia rent law as an emergency measure.[25] The passage in the *Macintosh* case, already quoted,[26] recognized a power to fix or regulate "prices of food and other necessities of life." In 1932, with these precedents at hand, Attorney General Mitchell ventured to advise the War Policies Commission that price control would be within the power of Congress if "reasonably necessary or proper for the efficient conduct of the war," and that "it can not now be said as a matter of law that the fixing of prices would necessarily be limited to the so-called necessaries."[27] In the succeeding decade the removal of price-fixing and wage-fixing from a special category and their assimilation to other kinds of regulation have dispelled the due-process doubts.[28]

The question remains whether the price fixed must provide a fair return or reasonable profit to the sellers in an industry, or at all events to some of them. The problem is not one of just compensation, since the price orders do not constitute a taking by the United States.[29] This is so even though the sale is to the United States at a price fixed by governmental order.[30] The present Act expressly provides, in Section 4 (d), that it shall not be construed to require any person to sell any commodity. Apart, then, from just compensation, is any standard of return required? In *Matthew Addy Co. v. United States*,[31] a criminal prosecution under the Lever Act, the question was left undecided. The President fixed a margin of fifteen cents a ton for jobbers in bituminous coal; the defendant charged more than this margin in selling coal which he had purchased prior to the issuance of the order. The order was held inapplicable by its terms to the sale of such pre-acquired coal; otherwise, the Court said, "a grave constitutional question" would be presented in the case of a jobber whose selling expenses exceeded the margin fixed. The implication is that where both purchase and resale followed the order the question would not similarly arise. How this rationale can be applied to producers and manufacturers, as distinguished from distributors, is not clear.

A number of considerations suggest that a fair return or reasonable profit is not constitutionally required in fixing prices under the Act. In the first place, as has

[24] 256 U. S. 135 (1921).

[25] *Cf.* also Marcus Brown Holding Co., Inc. v. Feldman, 256 U. S. 170 (1921).

[26] *Supra* at 77.

[27] H. R. Doc. No. 271, 72d Cong., 1st Sess. (1932) 34-38.

[28] Tagg Bros. & Moorhead v. U. S., 280 U. S. 420 (1930); O'Gorman & Young, Inc. v. Hartford Fire Ins. Co., 282 U. S. 251 (1931); Nebbia v. New York, 291 U. S. 502 (1934); West Coast Hotel Co. v. Parrish, 300 U. S. 379 (1937); Townsend v. Yeomans, 301 U. S. 441 (1937); U. S. v. Rock Royal Co-Operative, Inc., 307 U. S. 533 (1939); Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381 (1940); U. S. v. Darby, 312 U. S. 100 (1941); Olsen v. Nebraska, 313 U. S. 236 (1941).

[29] Morrisdale Coal Co. v. U. S., 259 U. S. 188 (1922).

[30] American Smelting and Rfg. Co. v. U. S., 259 U. S. 75 (1922).

[31] 264 U. S. 239 (1924).

been stated above, the Act does not impose a duty to sell. In that important respect the public-utility cases are inapplicable; in so far as those cases rest on an analogy to a taking by eminent domain, the foundation is undercut in the present Act. And even in the public-utility field there is no constitutional guaranty of a profit if unreasonable rates are necessary to produce it.[32] Moreover, the concept of fair return has not been applied to a business having relatively little physical property, but consisting largely of an organization of middlemen engaged in buying and selling on commission.[33]

Furthermore, with price control assimilated to other kinds of regulation, there seems little ground for judging price orders differently from wage orders or limitation of hours of labor or unemployment compensation. The latter regulations, it is true, affect the cost of doing business rather than the selling prices of products. Whether this difference has constitutional significance remains to be decided. In considering a milk dealer's attack on minimum purchase and resale price orders, the Court, in *Hegeman Farms Corporation v. Baldwin*,[34] put to one side the cases concerned with maximum prices challenged by sellers. Having done so, the Court held unanimously that a showing by the plaintiff that it was operating at a loss under the orders did not relieve it of the duty of compliance. While the case is perhaps explainable on the ground that the plaintiff did not show whether its loss was due to the orders or to inefficiency which would lead to loss even if the orders were altered, still the differentiation of the problem of maximum prices is noteworthy. It is not, however, altogether satisfying. The state had fixed minimum prices to be paid to producers and minimum prices to be charged to consumers. The dealer complained that, since it had to pay the minimum price to producers, and had to sell at a price which competition had fixed at the minimum set by the state for sales by dealers, it was completely at the mercy of the orders. The Court answered that, while cost was fixed, the selling price was determined by competition, and would be higher if the efficient members of the industry found a higher price necessary. In the case of maximum rates, on the other hand, the efficient business may have to "break the law or bleed to death." The assumption does not seem adequate for generalized constitutional doctrine. The efficient utility may be able to reduce its costs sufficiently no less than the efficient dealer may be able to raise its prices sufficiently. The Constitution can hardly be said to make its protection depend on the end at which the profit margin is squeezed. The fixing of a floor on costs which results in loss of profit should be authority for the fixing of a ceiling on prices which has the same result.

In the *Hegeman* case no issue was presented of the validity of an order that would make all, or most, of the business done in the industry unprofitable. An Act of Congress authorizing price orders framed to suppress an industry would require justification addressed to the relevance of that design under the war and related

[32] Public Service Comm'n v. Great Northern Utilities Co., 289 U. S. 130, 135 (1933).
[33] Acker v. U. S., 298 U. S. 426 (1936).
[34] 293 U. S. 163 (1934). See Note (1934) 34 COL. L. REV. 1336, 1339.

powers.[35] The present Act does not appear to authorize price orders for this purpose. The prices set must be in the judgment of the Administrator "generally fair and equitable" and such as will "effectuate the purposes of" the Act. Those purposes relate to profiteering, prevention of hardships, assurance of adequate production of commodities and services, prevention of post-war collapse, and stabilization of agricultural prices. So far as practicable, the Administrator must give due consideration to the prices prevailing between October 1 and October 15, 1941, or the nearest two-week period in which the prices of the commodity are generally representative, with adjustments for general changes in costs and profits of sellers of the commodity during and subsequent to the year ended October 1, 1941. Every order must be accompanied by a "statement of the considerations involved in the issuance of" such order. If those considerations are properly related to the declared purposes of the Act, it is difficult to conclude that an order would be constitutionally invalid because most or all of the enterprises in the industry would be unable to earn a profit on the commodity; the order would be as valid constitutionally as, for example, a minimum-wage order having the same effect.

One further consideration should be mentioned: The problem of applying a test of fair return in an economy honeycombed with wartime controls. Is a competitive business constitutionally entitled to its pre-war rate of profit? Apart from businesses subject to the maximum-price orders, no such suggestion would be made. Is the test, then, whether a reasonable profit could be made in the absence of the price order? To separate out merely the price order seems artificial. The costs of the business may be kept down by the existence of a price order affecting raw materials used in the business. These orders may be adjusted to each other, and to accept one while attacking the other is hardly permissible. A certain supply of materials may also be assured under allocation orders,[36] and these may presuppose a ceiling on the price of the finished product. A loss on a price-fixed product may be offset by government orders for other products. The problem goes beyond the technical rules of inseparability. It raises a doubt whether concepts of fair return are susceptible of practical application to a price order in an industry which is under a régime of interlacing government controls. To posit a peacetime economy, or a wartime economy with some controls removed and others retained, is to set up a standard which in its imaginative quality

[35] Compare Hamilton v. Kentucky Distilleries & Warehouse Co., *supra* note 4. Choices between industries on economic grounds have frequently been made in federal and state legislation; *e.g.*, Kentucky Whip & Collar Co. v. Illinois Central R. R., 299 U. S. 334 (1937) (convict-made goods); Miller v. Schoene, 276 U. S. 272 (1928) (red cedar and apple trees), and cases there cited; and see the tax cases cited by Brandeis, J., dissenting, in Liggett Co. v. Lee, 288 U. S. 517, 570-571 (1933).

[36] During the late War, the automobile industry protested against the plan of the War Industries Board for sharply curtailed production of cars. When it was pointed out that the spokesman for the industry was assuming a supply of steel available when it would not be, he replied, "We are willing to take our chances. Get your one hundred per cent war programme. We will take our chances of the situation in steel breaking." The historian of the Board observes: "So great was the demand for steel for war purposes in the remaining months of the war that it was demonstrated that the Board's plan was essentially far more considerate of the industry than the take-the-chances plan advocated by Mr. Chalmers." CLARKSON, INDUSTRIAL AMERICA IN THE WORLD WAR (1923) 342-343.

far outstrips the process of valuing a public utility by the calculation of reproduction cost new.

DELEGATION OF POWER

The discussion of Congressional power will have suggested that the factors entering into a determination of a "fair and equitable" price are to be dealt with on the administrative rather than the constitutional level. If this is so, the center of constitutional interest shifts to the issue of delegation of power to the Administrator.

The rule against delegation of power is an aspect of the larger guaranty of due process of law. So viewed, the standing of private parties to raise the issue becomes more readily explicable. The significant inquiry is whether the safeguards associated with the legislative process have a counterpart in the procedure which accompanies the delegation.[37] Traditionally, however, the issue of delegation has been resolved by examining the legislative statement of policies and standards to decide whether they adequately circumscribe administrative discretion. It has been observed on high authority that the criteria applied are apt to be more indefinite than the legislative standards being examined.[38] At all events, the process has about it an atmosphere of formalism if not of unreality. "Public interest, convenience, or necessity" has been approved as an adequate standard for the licensing of radio stations,[39] though the first annual report of the Radio Commission contained a frank admission by one of its members of the large area of policy-making left for development:[40]

> That, in just four words, is what Congress has told us to do. We are to determine who shall and who shall not broadcast and how such broadcasting shall be carried on, simply in accordance with our conception of public interest, convenience, or necessity.
>
> It is a rather appalling responsibility. . . .
>
> . . . We can not evade this responsibility, for it is the thing which Congress has told us we must do, and it is the thing which the people of America rightly demand shall be done. The variety of broadcasting service has become infinite; how shall we measure the conflicting claims of grand opera and religious services, of market reports and direct advertising, of jazz orchestras and lectures on the diseases of hogs?

"Equalization of costs of production" was regarded as an adequate standard for the administration of the flexible tariff,[41] though Chief Justice Taft, who delivered the Court's opinion, had declared when President that "the precise difference in cost of production sought for is not capable of precise ascertainment, and that all that even the most scientific person can do in his investigation is, after consideration of many facts which he learns, to exercise his best judgment in reaching a conclusion."[42]

[37] "There is an obvious difference between legislative determination and the finding of an administrative official not supported by evidence. In theory, at least, the legislature acts upon adequate knowledge after full consideration and through members who represent the entire public." Southern Ry. v. Virginia, 290 U. S. 190, 197 (1933).

[38] JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941) 95.

[39] Federal Radio Comm'n v. Nelson Bros. Co., 289 U. S. 266 (1933).

[40] ANN. REP. FED. RADIO COMM'N, 1927, p. 6 (address of Commissioner Bellows).

[41] Hampton & Co. v. U. S., 276 U. S. 394 (1928).

[42] J. of Commerce, Aug. 20 and 29, 1910, quoted in LARKIN, THE PRESIDENT'S CONTROL OF THE TARIFF (1936) 70.

To the interests contesting these statutes, the delusive exactness of phrases was less important than assurance of a relatively reasoned and disinterested judgment. The procedure established, particularly in the case of the Radio Commission, and a comparison with the legislative process, particularly in the case of the tariff, might have been given greater due in reaching a conclusion favorable to the acts.

It is reassuring to find, in a decision of last Term, that the Court is taking a more comprehensive view of the issue of delegation, and is apparently regarding it as a problem of responsibility in government, to be resolved by an examination of all the safeguards which have been provided. In *Opp Cotton Mills, Inc. v. Administrator of Wage and Hour Division,* Mr. Justice Stone said:[43]

> True, the appraisal of facts in the light of the declared policy and in conformity to prescribed legislative standards, and the inferences to be drawn by the administrative agency from the facts, so appraised, involve the exercise of judgment within the prescribed limits. But where, as in the present case, the standards set up for the guidance of the administrative agency, the procedure which it is directed to follow and the record of its action which is required by the statute to be kept or which is in fact preserved, are such that Congress, the courts and the public can ascertain whether the agency has conformed to the standards which Congress has prescribed, there is no failure of performance of the legislative function.

All this is not said by way of extenuation of the Price Control Act. By conventional tests the standards set forth in the Act are well within the limits of tolerance. The standards have already been described. Obviously they leave much to the judgment of the Administrator. On what commodities price orders should be placed; what is a fair and equitable price, for both the sellers and purchasers; what is a representative base period; what part of the industry shall be regarded as having representative costs; when shall a two-price system be established, to encourage production by high-cost producers; what weight shall be given to profits in the industry from the sale of other commodities, or to changes in unit costs caused by expansion or contraction of volume, or to additional investment in plant;—these are some of the questions that will have to be faced. They are not, however, different in kind from those which are commonly committed to administrative judgment. The objectives of the Act are coherent, and the weighing of the factors determining a fair price in the light of those objectives will be disclosed in the required statement of considerations accompanying a price order.

The flexible tariff, for all the seeming certainty of its "costs of production" formula, left a wider range of choice to the executive, not only in the arithmetic components of the rates but in the very objectives of the system. The fundamental choice was whether, of all the dutiable commodities, those should be selected for change whose rates were too low or too high.[44] The law could serve for either a

[43] 312 U. S. 126, 144 (1941).

[44] "Addressing the House of Representatives on May 22, 1929, he [the late James M. Beck] said: 'It is a beautiful law so long as you have a high-tariff President. You do not have to wait for Congress to Politics are precarious and now in a very fluid state. There might be an upheaval in Europe that will cause tells them to make a report upon this or that duty, and up goes the duty.

" 'But are you so certain that three years or seven years from now we will have a high-tariff President? propose anything. As the exigencies seem to justify, the President sends for the Tariff Commission and

general upward or downward revision. Moreover, the factors entering into a comparison of costs permitted wide variations in the ultimate figure reached: the determination of principal competing country and the principal market of the United States; the choice of period of time for comparative study; the use of weighted-average or bulk-line costs; the treatment of joint costs; the problem of comparing goods "like or similar"; the ascertainment of labor expenses; the question of including costs of distribution and transportation; and the meaning of "any other advantages or disadvantages in competition." But this is not all. While the President in altering rates was limited to a change of not more than 50%, he could decide to change the classification of a commodity or to change the basis of valuation from foreign value to American selling price. It was thus possible to reduce a rate of 45 to 27.5% and at the same time bring about an increase in duty to 115% of the foreign value.[45] This range of discretion is the more remarkable in the light of the fact that findings reciting the statutory formula are largely insulated from review.[46]

Statutory formulas may serve to conceal the problems of judgment which they create. Orderly administrative procedure, and a reference to the data and considerations employed, serve to expose and illuminate the problems. It is here, primarily, that we must look for safeguards comparable to those in the legislative process.

In time of war, particularly, when hardships will have to be borne as a matter of course, essential constitutional guaranties will be found in responsible procedures. This should be as true of price-fixing as of conscription of men. What is to be avoided is Lydford law.[47] In procedural safeguards will be found the balance between governance and responsibility, between *gubernaculum* and *jurisdictio*,[48] which has been at the core of the long struggle for constitutionalism.

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a disruption of our economic system in this country, and the higher the wave is the more destructive its violence will be when the wave breaks. Let us imagine a low-tariff Democrat President, like my friend from Tennessee [Mr. Hull], one of the old guard for tariff for revenue only.' Reprinted in BECK, MAY IT PLEASE THE COURT (1930) 438." See Book Review (1937) 50 HARV. L. REV. 718, 719n.

[45] See LARKIN, *supra* note 42, at 103-150, 87.

[46] U. S. v. Bush & Co., 310 U. S. 371 (1940).

[47] "I oft have heard of Lydford law,
How in the morn they hang and draw,
And sit in judgment after."—William Browne.

[48] MCILWAIN, CONSTITUTIONALISM, ANCIENT AND MODERN (1940) 149.

ECONOMIC CONSIDERATIONS IN ESTABLISHING MAXIMUM PRICES IN WARTIME[1]

DONALD H. WALLACE* AND PHILIP H. COOMBS†

Government administration of the nation's price structure is a gigantic and unenviable task. It involves substituting human calculations for the impersonal dictates of the complex market mechanism which arbitrates the conflict of powerful economic forces in peacetime. It necessitates replacing the myriad of price decisions made by thousands of individual buyers and sellers in peacetime with the judgments of a relatively few government experts. It means influencing directly the pocketbooks of numerous groups and individuals who in general profess sincere approval of a vigorous price stabilization program but who frequently petition for special treatment of their own particular prices while urging that all others be prevented from rising.

The purpose of this article is to set forth some of the more important economic considerations which are appropriate in establishing maximum wartime prices, with particular reference to the operations of the Office of Price Administration.

Such considerations are, of course, influenced by the nature of the social-economic framework within which a price administration program is conducted. The basic assumptions of our present discussion are simply those realistic conditions which confront the Office of Price Administration today. These conditions include: (1) a rapidly growing war program which has already reached the proportions of nearly 160 billion dollars; (2) substantial shortages of the necessary manpower, facilities, and materials to fulfill this program; (3) the consequent necessity of increasingly drastic direct controls over the allocation and use of economic resources; (4) the provisions of the Emergency Price Control Act of 1942 which provide the framework for the activities of the price agency; (5) the likelihood of stronger taxes and other

[1] Some parts of this article are based upon an unpublished paper presented by us at the annual meetings of the American Statistical Association in December, 1941. We are indebted to the Association for permission to use that paper in the preparation of this article.

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fiscal measures which will, however, continue to fall far short of eliminating the growing "inflationary gap" between current spendable funds and the aggregate of available goods and services valued at present price levels; and (6) a general expectation that the war will last at least another two years.

Determination of the appropriate economic considerations in fixing wartime prices involves answering two broad questions: (1) What behavior of prices, individually and collectively, is conducive to achievement of the most effective war effort, and to minimizing post-war maladjustments? and (2) What standards and techniques of control can best achieve this sort of price behavior? In seeking answers to these questions our procedure will be to discuss, first, the general nature and objectives of the price control program; second, the activities of the Office of Price Administration to date; third, the techniques of control available to the Office of Price Administration; fourth, the appropriate economic criteria applicable to fixing individual prices or groups of prices; and fifth, the possible application of the foregoing standards and techniques to particular types of market situations; and sixth, the problems of a broad ceiling.

The Nature and Objectives of the Price Control Program

The adoption of a price control program implies that, without regulation, prices in wartime would behave in a manner detrimental both to the most efficient conduct of the war and to the civilian economy, and injurious to the post-war interests in the Nation, insofar as the latter can be considered. Similarly, it implies that there must be some "desirable" as well as "undesirable" way for prices to behave in wartime. This "desirable" behavior of the American price structure during the present emergency is perhaps best described in terms of the general objectives toward which price control actions should be directed, and in terms of the types of price behavior to be avoided.

The first objective of price control is to promote maximum efficiency of the war program. This result must be achieved not merely by preventing a wild upward surge of prices generally (which is popularly conceived to be the sole function of the price agency) but also by achieving an appropriate adjustment of price relationships. Stabilization and careful adjustment of the prices of important materials increase efficiency by reducing speculative hoarding and business uncertainties; by minimizing the wasteful competitive bidding away of materials and labor; and by facilitating the effective operation of curtailment, allocation, priority, and other direct control programs designed to allocate resources and products to most important uses, through encouraging or discouraging the desired expansion or decline in production of different things made from the same materials.

The second objective of price control is to combat the inequitable distribution of the war burden which would result under inflation through a sharp rise in living costs accompanied by grossly uneven changes in individual incomes. Such developments, particularly onerous to fixed-income groups, stimulate the familiar outcries

against "profiteering" which are so injurious to morale and lead understandably to widespread agitation for wage increases and increase industrial disputes.

Third, price control should retard further creation of inflationary purchasing power, by preventing sharp increases in income-generating prices, by reducing the demand for wage advances, and by holding down the money costs of war materials, thus reducing the necessary amount of inflationary government borrowing.

Finally, price controls should be designed to minimize post-war maladjustments by forestalling disastrous deflation and by preventing unnecessary disruption of market structures and trade practices during the war.

Price control should be regarded as one member of a coordinated family of wartime controls which are calculated in the aggregate to achieve a prompt conversion of the economy to a wartime basis, to assure adequate production of needed supplies in the right proportion and in the shortest possible time, and to guard against needless injury to civilian living standards and unnecessary post-war hardships. Thus, price control must be supplemented by correct monetary and fiscal policy to combat inflation. It must be coordinated with programs of curtailment, priorities, and allocation to achieve the best use of resources to meet military requirements and essential civilian needs. Similarly, price control and rationing of consumer goods must be coordinated to achieve equitable distribution and a high level of morale.

A rather sharp distinction has been drawn in public discussion between (1) selective price control and (2) the over-all ceiling method. In practice, however, these two approaches may well lead to much the same result. A vigorous price control agency, confronted by rapidly growing inflationary pressures, may rapidly extend the scope of selective control to the point of forming virtually an over-all ceiling; whereas a general ceiling, simultaneously imposed on all prices, is certain to become gradually modified by selective treatment of individual commodities covered by the initial ceiling. To a considerable extent the differences are a matter of the extent and strength of inflationary pressures, of timing, and of administrative method. Before intense inflationary pressure becomes generalized throughout the economy a program of selective control has the advantages of permitting the price agency to focus its attention and energy upon a narrower range of key commodities, to act more flexibly, and to give greater consideration to the fixing of any individual price. It also permits some time for building up an administrative staff and developing a body of experience. In the face of rapidly growing inflationary pressure, however, selective control has the marked disadvantage of permitting many prices to run away while a few are being tended to; it obliges the price agency to take the initiative in fixing individual prices. A broad ceiling, on the other hand, has the advantage of stopping inflation in its tracks, and it shifts the burden of proof to individual businessmen who feel that the ceiling has treated them unjustly. The general ceiling has the disadvantages, however, of injecting a sudden rigidity into the whole price structure; it heaps upon the price agency the task of considering pleas for relief which come promptly from all directions and consequently result in the dissipation

of administrative energies over a broader area which includes unimportant as well as important commodity prices; and it rules out the possibility of applying as thorough judgment to each individual price ceiling. If inflationary pressure mounts too rapidly, however, owing to inadequacy of fiscal control measures in the face of mounting expenditures, the over-all ceiling becomes the only effective instrument for stemming the tide and preventing severe inflation.

The Activities of the Office of Price Administration to Date

Selective price control operates on the principle of achieving the desired results with a minimum application of direct control and expenditure of administrative energy. It is conducted on the premise that certain "strategic" prices are keystones of the price structure and perform a price-determining function through their influence upon the prices of completing and competing goods, or upon the prices of the same commodity at earlier or later stages of the production-distribution structure. Thus, stabilization of the prices of the leading metals exerts a stabilizing influence upon prices of fabricated goods into which they enter.

Consequently, those prices are selected for control which have risen or threaten to rise, which are quantitatively important in terms of government or consumer expenditures, and which are strategic in the pricing process.

The appropriate point at which to apply control depends largely on the form of the product and the characteristics of the market structure at various levels. In general, effective results are best obtained when control is applied: (a) at the last stage of production before a basic material is dispersed in many directions and into numerous fabricated forms, (b) where the products of all sellers are fairly uniform or standardized, (c) where the number of sellers is small and the merchandise assortments limited, and (d) where trade practices, including methods of quoting prices, are relatively simple. Administration of prices by government agencies is simplest in the case of privately "administered prices" where the task is merely that of controlling the controllers.

In light of the above criteria for selecting commodities and points of control, it is to be expected that the initial stages of a price control program would concentrate particularly upon basic materials such as metals, building materials, industrial chemicals, and textiles. If inflationary pressures continue, the scope of price action must be extended to semi-fabricated and finished goods and ultimately to the retail level. This assumes that price control influence is generally best transmitted from fairly early to later stages of the production-distribution structure. The reverse is, of course, true for some commodities.

The experience of the Office of Price Administration, up to the second quarter of 1942, has conformed in general to the pattern of developments described above. Major emphasis was on basic materials until the third quarter of 1941, after which time an increasing number of semi-fabricated materials, machinery items, and

finished goods have come within the scope of control; but the retail level had been penetrated in but few spots by the end of March, 1942.

The total area over which selective controls must eventually be extended to achieve satisfactory results depends upon a host of imponderable factors and so can be determined only by experience.

The answer depends heavily upon the volume of excess spendable funds (coming both from wages and profits) and the extent to which such funds spill over from the controlled shortage items into uncontrolled areas where the inelasticity of supply and demand engenders new price advances in these areas, rather than flowing into areas where supply is elastic or into war savings, other securities, or hoards. In other words, price control of certain key commodities may encourage saving of the funds which would otherwise have been spent on those commodities, thus reducing the inflationary gap, or it may simply shift inflationary pressure from one area to another.

Profits, wages, farm prices, and rents are strategic factors, both economically and politically, in determining the extent to which price control must be applied. Increases in one or more of these forms of income increase the total of excess spendable funds, thus exerting a further inflationary pressure on consumer goods prices. But the picture is more complex than that. Sharp profit increases, resulting either from lower unit costs of high-volume operation or from overgenerous war contracts, and the rising cost of living which results mainly from advancing farm prices and rents, are the two major stimulants of wage demands. Increased wages, in turn, frequently take the form of higher unit costs and hence become a major source of further upward pressure on prices. Obviously, all four forms of income must be stabilized, whether by direct control or by other means, if a runaway inflation is to be avoided.

Price control in the United States to date (April 1, 1942) already covers a much broader area than is commonly realized; yet the continued rapid growth of inflationary pressure makes it apparent that control must be extended much further if the objectives discussed earlier are to be achieved. By April 1, 1942, the Office of Price Administration had established 112 formal ceilings covering commodities that make up nearly 40% of the comprehensive wholesale price index of the Bureau of Labor Statistics. Informal controls had also been established over a large number of additional commodities. In the aggregate the commodities covered represented perhaps 60% of the nation's sales volume, exclusive of retail sales. The recent rapid increase in the cost of living, the prospective large growth in purchasing power, and the necessary curtailment of consumer goods make it imperative to extend control over nearly the whole of the remaining area of prices in the near future.

In applying selective price control, the Office of Price Administration has employed a wide variety of techniques, tailored to fit each particular case. Formal action has been used only when informal and indirect methods were inadequate. With the steady growth of war expenditures and disappearance of unused capacity, informal actions have, of course, become ineffective in more and more instances.

Expansion of supply, when possible, has been viewed as the most desirable method of limiting price advances and was particularly prominent in the early stages of the present program when considerable productive slack still remained. Methods of enlarging supply include: (a) encouragement of imports by tariff reductions or negotiation with foreign governments and producers; (b) limitation of exports; (c) encouragement of full capacity operations or expansion of capacity if necessary; (d) encouragement of substitution and conservation; and (e) discouragement of excessive inventory building and speculative hoarding.

In their efforts to expand supply, the price control authorities have sought directly the cooperation of industry and have coordinated their efforts with numerous other government agencies. Such steps have been taken in the case of primary copper, zinc, lead, and aluminum, petroleum products, fats and oils, sugar, a wide variety of machines and parts, ferrous and nonferrous castings, and a number of other commodities.

Indirect limitation of price advances has also been attempted through influencing trade practices and government procurement activities. For example, commodity exchange officials were asked to limit margins and price movements on certain materials. Producers have been asked to make firm price terms in contracts for future delivery. Suggestions and requests have been made to the Army, Navy, and Procurement Division of the Treasury regarding such matters as escalator clauses, the scheduling of deliveries to avoid unnecessary bunching of supplies, and relaxation of specifications to permit substitution of abundant for scarce materials.

A third and important group of informal techniques includes warnings, suggestions, and requests to industry to withdraw price advances or avoid threatened increases. Many of the present formal ceilings were preceded by such informal actions.

Closely related are informal agreements with individual industry members to maintain existing prices for a specified period or to refrain from increases without prior consultation with the price agency. Such agreements are achieved through industry meetings, individual conferences, or correspondence. So-called "freeze letters," requesting agreements to hold prices firm, have become increasingly important in recent months as the need for prompt action has increased and as the price program has reached into areas where a uniform price for the industry is impractical due to the differentiation of products. Early in the program an effective method for holding down certain basic prices, especially of metals, was the "bell cow" technique whereby a price-freezing agreement was reached with one or more prominent price leaders who had unused capacity. Signed agreements have been employed increasingly.

As inflationary pressures grew, it was necessary to use in more and more instances a formal maximum price schedule or regulation. In addition to establishing specific maximum prices the schedule or regulation may set forth certain trade practice regulations for a particular commodity or group.

The procedure of selective price control, as practiced by the OPA, begins with the detection of actual or threatened price increases, followed by a preliminary decision as to whether price action is likely to be necessary. Second, an economic study of the industry is undertaken, if not already under way, bringing together all available information from various government and industry sources. The third step is usually to summon members of the industry for a general conference on the facts of the situation and on the most advisable course of action. Against this background of facts and opinions, the final determination of policy is made, the details worked out, and the formal price schedule drafted, if this is the plan decided upon.

This normal procedure, which often consumes many weeks, must sometimes be telescoped into a few days or hours when there is pressing need for quick action.

The work is by no means ended when the schedule is issued. Careful observation of the price schedule's repercussions on the market must follow. When imperfections appear or when basic market shifts require revision of the schedule, the price agency must again examine the facts, confer with industry members, and then proceed to iron out wrinkles with a series of amendments if necessary.

The final task is that of securing compliance. While this is mainly a job for the lawyers, an economist's greatest resources are frequently taxed to devise a counter offensive against ingenious evaders. Some price violations are of the crude variety, such as "cash-on-the-barrel" sales in excess of established ceilings, or cash payments on the side in addition to recorded payments at the ceiling. Such unrecorded sales or cash premiums are, of course, direct violations, since all price schedules require detailed records of all transactions. More subtle forms of violation include: (1) mislabeling, such as "upgrading" of iron and steel scrap; (2) payment of excessive prices for uncontrolled merchandise in company with price-controlled items purchased at the ceiling; and (3) breaking of carload orders into less-than-carload shipments to obtain small lot premiums. The forestalling of such devious methods of evasion requires both a close acquaintance with the detailed characteristics of each commodity market and skilful drafting of price regulations.

Economic Criteria in Setting Maximum Prices[2]

The Price Control Act of 1942[3] sets forth certain broad purposes and standards to be used by the Price Administrator in establishing maximum prices. "Whenever in the judgment of the Price Administrator the price or prices of a commodity or commodities have risen or threatened to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act." (§2(a))

The purposes of the Act are set forth in its preamble (§1(a)) as follows:

[2] We do not consider in this article the criteria related to the special standards provided in the Act for maximum prices of agricultural commodities.

[3] Pub. L. No. 421, 77th Cong., 2d Sess. (1942).

1. "To stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents";

2. "To eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency";

3. "To assure that defense appropriations are not dissipated by excessive prices";

4. "To protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living";

5. "To prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State and local governments, which would result from abnormal increases in prices";

6. "To assist in securing adequate production of commodities and facilities";

7. "To prevent a post-emergency collapse of values";

8. "To stabilize agricultural prices in the manner provided for in section 3"; and

9. "To permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes."

The main purposes, apart from those concerned with the post-war interests of the country, may be summarized in three categories: (1) to prevent inflation of the general price level and all its attendant hardships, (2) to minimize the cost of the war to the Government and the people, and (3) to facilitate the maximum needed output of war goods and essential civilian goods.

The foregoing may thus be combined into the following proposition: The adverse effects of inflation upon the production of war goods and essential civilian goods, on the welfare of the people, on the cost of the war to the Government and to the people, and on post-war conditions are to be minimized by administering prices (1) so as to prevent price increases which are not necessary to promote maximum needed supplies of war and essential civilian goods, (2) so as to facilitate the production of these goods in the right proportionate amounts, and (3) so as to be generally fair and equitable.

Section 2(a) provides:

> So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941.

The extent to which these more specific standards of the Act limit the administrative discretion of OPA in establishing maximum prices is a legal question which is discussed in another article in this volume.[4] However, the broad purposes and standards of the Act as outlined above suggest both purely economic criteria in terms of prices that are no higher than adequate or necessary for the supply objectives,

[4] Ginsburg, *The Emergency Price Control Act of 1942: Basic Authority and Sanctions*, *supra*, at 22.

and criteria that represent a combination of economic and ethical considerations. Costs and profits are relevant to both, although the emphasis in the case of economic criteria is more on costs and in the case of considerations of fairness more on profits.

The task of price administration is to prevent price increases,[5] except where they are necessary according to the standards outlined above, and to reduce prices that have risen unduly. In passing upon potential or requested price advances the first economic criterion is simple and obvious: Price increases are necessary only when they are required in order to increase or to maintain the production and distribution of needed supply. Where a needed portion of current production cannot be maintained without a rise in price, because direct cost per unit has risen above price, or so close to price that there is an insufficient margin for contingencies and for the productive health of producers, then a price increase is in order. But where a higher price would have no effect on the volume of output, the enlarged revenue merely going into profits or wages, or both, justification is less obvious. It should be made clear, however, that the general principle here set forth would permit price increases where profits were so low that producers of essential goods could not make improvements required for greater efficiency, maintain the efficiency of the technical staff, provide against contingencies, and so forth. Similarly, price increases are justifiable if required in order to raise subnormal wages, because the profit margin is too thin to stand the wage increase.

We have spoken of prices in relation to "needed supplies" rather than maximum production. To all of us who have been accustomed to think in terms of maximum production of goods proportioned to freely-expressed consumer demand, the phrase "needed supplies" brings a shock. But in a war economy the production of many civilian goods must be curtailed, some drastically, some moderately. In large measure this can best be achieved by direct methods—curtailment and allocation programs. Price control is, however, a useful supplementary instrument. Prices should not be so high as to make evasion of the curtailment or allocation orders highly profitable. Secondly, where change-over from civilian to war production is possible, prices on the civilian goods must not be so high as to make their production more profitable than that of war goods. Again, it is obviously more difficult to allocate labor by direct methods than to allocate materials and machinery by such methods. Wherever allocation of labor is imperative in order to achieve production of several different commodities in certain proportions needed for the war effort, the relative prices on these commodities should not be such as to encourage greater production of one than is needed, at the expense of less production of the others. It must be emphasized, however, that price control alone is likely to prove inadequate in the long run as a means of achieving the desired allocation of manpower to most important

[5] An increase in selling price (or its equivalent in revenue) does not necessarily imply that this must be passed on in the form of commensurate increases in selling prices at later stages of production and distribution. Processors or distributors at later stages may be able to absorb the price increase. Moreover, the Office of Price Administration and other government agencies are empowered by the Act to use buying and selling programs or subsidies to achieve maximum necessary production. §2(e).

uses, and to prevent uneconomic shifting about of labor. A more vigorous policy of wage stabilization and even direct allocation controls may well become necessary as the shortage of certain types of labor grows more acute.

We have said that the major problem is to develop criteria by which to assess potential or requested price increases. In a defense program inaugurated when most industries are operating below capacity, the typical pattern of development in those industries whose supply of materials or labor is not curtailed is expansion of output accompanied by falling unit costs for a time. Profits increase, often strikingly. Energetic labor unions are able to obtain increases in wage rates. Other wage increases come automatically because they are required to prevent transfer of skilled labor when shortages develop early. Some price increases on materials occur. Finally, as output is pushed beyond the point of most efficient use of plant, in the sense of lowest cost use, unit cost begins to rise for familiar reasons. In extractive industries such as mining, rising unit costs may be encountered sooner owing to technical conditions such as the existence of different grades of ore, differences in depth of mining, differences in structure of ore deposits, and the like.

As long as price is above total cost per unit and unit cost is declining with expansion of output, profits are increasing and there is obviously no justification for a price increase. As long as price remains above the cost added to total cost by additional output and profits increase with growing output, there is generally no justification for a price increase. Only when the out-of-pocket costs per unit or the additional cost of extra units of output increase, either because of increases in the prices of materials or wage rates, or because unit costs rise with expanded output, does any question of a justifiable price increase ordinarily occur. From the standpoint of the objectives outlined above, the criterion that every increase in direct or out-of-pocket cost justifies an increase in price by a corresponding amount, is not a correct standard, however familiar and pleasing to managements. Rather the criterion should be that increases in direct cost should be absorbed as long as maximum needed production is still possible. Wherever the margin between price and direct cost per unit has been large this may mean that cost increases can be absorbed for some time—especially if increases in wage rates or material costs are moderate and unit costs increase slowly.

These economic criteria for assessing the justification of price increases apply also, of course, to cases where prices have risen before control was applied. The amount of the appropriate reduction, if any, is indicated by application of the same criteria. It is obvious, however, that if price increases are permitted to endure for some time before control is imposed, increases in cost elements may have been induced, with the result that application of these criteria will give a higher price than they would have indicated earlier.

Most of the public attention in relation to war price administration has been focussed on prevention of price increases. It is worth emphasizing that price reductions may greatly facilitate promotion of the objectives of war administration, par-

ticularly where an inflationary price increase has already occurred. Price reductions which prevented undue increase in profit rates, wage rates, or prices paid for materials would, indeed, be effective in limiting the expansion of credit and in choking the first stages of inflationary impulses that spiral into other industries. Reductions which lower the cost to the government of war goods tend to lower the government debt and the inflationary gap.[6] Reductions which permit continuance of stable prices at later stages of production or distribution are obviously advantageous.

We have said that the basic economic criterion for price increases is maintenance of needed supply or expansion to the needed volume. It is now plain that in most cases this will come down to a criterion in terms of profits. In a strict economic sense the appropriate standard would be profits merely adequate to achieve the objective. Notions of fairness which mean something somewhat different from sheer adequacy in the sense used above are, however, common and widespread. Hence they should be woven into the standards for maximum prices and Congress has recognized this by providing that maximum prices are to be "generally fair and equitable" and that the "general increases or decreases in profits" of sellers are to be given consideration in fixing maximum prices.

There are two possible alternative concepts of fair profits. One runs in terms of a percentage of return on investment, the other in terms of dollar volume of profits. The former is familiar, in the notion of "fair return on fair value," as an instrument for accomplishing in monopolistic industries producing services of great public interest the results which were supposed to flow from competitive forces in other industries. The theory of "fair return on fair value" is, in our judgment, not applicable to the program of war price control with objectives which we have outlined above. The problem is not one of attracting capital to a relatively few regulated industries, protecting their investors from regulations that would reduce their earnings below what they would receive in unregulated industries of similar risk factors, and protecting consumers from monopolistic exploitation. Rather it is a problem of protecting all the various groups in the community from the cruel inequities of severe inflation and at the same time promoting the maximum production and flow of the needed supplies of war goods and essential civilian goods. Moreover, as a practical matter, war price control must be capable of rapid and flexible operation. Determination of fair value for a utility or transportation company has often taken many years. Any attempt to base maximum prices in war time on a fair valuation process would constitute a *reductio ad absurdum* that would greatly cheer the spirits of our enemies. Valuation is a dubious luxury that we can, perhaps, afford in peace-

[6] Price reductions are also desirable where the effect is to expand production and consumption of civilian articles that may be substituted for other goods whose civilian consumption is drastically reduced. Provided this means a net increase in civilian output and consumption with an elastic demand for the substitute articles, such price reductions would also have the beneficial effect of an increase in expenditure on them, leaving consumers less to spend on other things and hence reducing the inflationary pressure on those civilian goods whose production is not expansible or is curtailed. Expanded civilian production of price-reduced articles becomes increasingly less feasible, of course, as more and more resources must be converted to war use, except where the resources required for such civilian items are not convertible to war production.

time. In wartime it would be criminal pettifogging. Hence it would not be consistent with the expressed purposes of the Act. The notion of fair rate of profit on investment could indeed be applied in short-cut fashion by taking book figures of investment and average rates of return earned in some past period. But this would come to much the same result as the use of dollar volume of profits in the same pre-war period and would have the disadvantage of much more computation. Application of a flat percentage return on investment in all industries would be inadvisable. In some cases the resulting maximum prices would be too low to accomplish the objectives, in other cases unnecessarily large price increases would have to be permitted.

A criterion of dollar volume of profits in a recent pre-war period is much superior to those just discussed. Its logic is based on the premise that the conditions permitting higher prices and larger profits are themselves due to the war rather than to the efforts and activities of firms or industries or to fortuitous peacetime developments. Use of this standard would tend toward approximation of the pre-war relative profit situation as between firms and industries, insofar as price control affects the matter. The dollar volume of profits of a firm in the pre-war period, must, of course, be adjusted for a return on any net increase or decrease in investment during the interim.

Given the guiding principle that, in general, individuals should not profit from the peculiar economic circumstances created by war, especially when millions of others are adversely affected by these same conditions, even to the point of sacrificing their lives, a reasonable formula would relate wartime profits to the best estimate of what profits would have been in the absence of war; and that best estimate might reasonably be based upon the earnings of enterprises in a near pre-war period, making allowance for changes in invested capital.

In many instances use of the period 1936-1939 would accord with what has been said above. In some instances, however, the amount of profits earned in that period might be insufficient to sustain the supplies needed now. In other instances the profits of a shorter period, such as the year 1940, or the twelve months preceding October 1, 1941, might be more appropriate on the grounds that war influences had not yet made themselves felt in these cases.

It should be noted that profits must be interpreted to mean profits before income and excess profits taxes. Otherwise, the express intent of Congress as to the distribution of the war burden, in terms of the incidence of taxes, would be vitiated. In other words, if the price authorities followed the policy of relating war profits after taxes to peacetime profits, they would defeat the efforts of Congress to impose higher income taxes upon business concerns as a means of distributing the costs of war among various income groups.

Before departing from the question of "fair profit," it is perhaps worth emphasizing that the price control authorities should not be held responsible for guaranteeing profits to all concerns, through appropriate price adjustments. In the first place, such

a policy would entail providing wartime profits to concerns that were unable to earn profits in peacetime markets. Second, the price agency would find itself in the ridiculous position of endeavoring to offset the numerous economic hardships of war created by factors beyond the pale of price control, such as curtailment of materials for civilian commodities. This would amount to a widespread system of granting indirect subsidies via the price structure in a manner which would be not merely arbitrary and capricious but which would discourage rapid conversion of facilities to war use and distort thoroughly the balance and function of the price structure. Finally, such a policy of encouraging universal wartime profits might well result in ruinous misdirection of the price control program, away from its prime objectives.

Our discussion so far has concerned the level of prices for an industry or a firm. Price administration must also concern itself with the structure of the relative prices for different grades, constructions, lines, or products produced by a firm or an industry. Where determination of such price differentials is not important for the objectives of price control and where informal controls are effective, such determination can be left to management, the price control agency concerning itself only with the level of prices. Where the price differentials exercise an important influence on the relative volume of output of war goods and civilian goods, and of more essential and less essential goods, the price agency may need to participate in determination of such differentials even though no formal ceiling schedule is required.

Where a ceiling schedule is necessary, differentials—at least the more important ones—must be set in the schedule. In many cases typical or customary differentials, derived from recent price history, constitute the best criterion. A supplementary criterion which seems satisfactory is that an individual price does not need to be increased provided it covers the out-of-pocket cost of the thing in question and provided the total profits of the firm, or of the bulk of the firms in the industry, are adequate and fair. These standards must sometimes be modified when the relative volume of output of different things is a matter of significance and when special considerations affect relative volume. In wartime, however, it is often desirable that firms temporarily abandon strict commercial principles for pricing of different lines or products. For example, quite apart from relative profit considerations, repair parts and strip models should be sold at relatively low prices.

When, as, and if an over-all freeze of all prices becomes necessary the problem of adjustments in relative prices may become more important.

Techniques and Criteria Applied to Special Problems

To illuminate briefly the application of the techniques and standards discussed above let us examine their practical application to two specific problems confronting the price authorities: (1) securing high-cost supply with minimum inflationary effect; (2) stabilizing prices of unstandardized commodities.

The first problem arises because different increments of the supply of a com-

modity generally have different costs. Such cost differences are likely to be more marked in a war economy, because it is imperative to achieve "all out" production, both to maximize the output of war goods and to attain the largest production of civilian goods consistent therewith. "All out" production requires the use of existing operating facilities beyond their most efficient rates of output under ordinary calculations. It also requires the development of increments of output from mines and old plants or factories that have long been idle because of excessive costs. In the last war the price control authorities applied the theory of uniform, bulk-line maximum prices—*i.e.*, prices adequate to secure the great bulk of the output. Use of this principle may not enable maximum possible production, and results in obtaining the higher cost increments only by great price increases, in other words by inflation. Maximum needed production without severe inflation can be accomplished by the use of differential prices—a base price for a part of the output and one or more higher prices for additional increments. A differential price scheme, effectively designed and carried out, can minimize the cost to government and to private consumers, minimize the amount of price-induced creation of credit, minimize the inflationary repercussions in other industries of wage-rate advances that merely reflect a large increase in price, and prevent the pyramiding in subsequent stages of a marked price increase on materials or semi-processed goods.

Determination of the base price and the higher differential prices must be partly a matter of expediency but some standards can be laid down. In general the ideal would be a set of prices which would minimize the total cost of the output to consumers, for this set of prices would best promote the other ends in view also. Often such precision is unattainable in practice, and cruder standards must be employed. If the ascertainable cost curve for the industry's total supply rises sharply after a certain output point, that is an obvious point at which to set the maximum base price.[7]

Again, where a given uniform price has ruled for some time prior to introduction of differential pricing, it may be best to designate that price as the base price and build differential prices above it. In setting the height of differential prices it is important to strike a balance which will permit maximum needed production without bringing unnecessary increases in profits or wage rates which threaten both the maximizing of additional output and the volume of production forthcoming at the base price.

So far in the discussion of differential pricing we have been speaking of prices paid to producers for different increments of output. With regard to prices paid

[7] For example, suppose the maximum potential supply of a metal is one million tons, and a price of 25c per pound would be required to bring out this amount, at a total expenditure of $500 million. A differential pricing system could reduce the total expenditure by establishing a base price, at which a large portion of the total would be produced, and a premium price or prices which would stimulate production of the remainder. Let us say that the $500 million could be reduced to $380 million by establishing a base price of 15c at which 60% of the total potential supply (*i.e.*, 600,000 tons) would be forthcoming, together with a "premium price" of 25c at which the remaining 40% (or 400,000 tons) would come out. The net saving would be $120 million.

by consumers there are several alternatives. In the first place, producers may be permitted to sell the higher-cost increments of output, at prices above the ceiling base price, to whatever consumers are willing to pay the higher prices. This is the simplest arrangement but it has the obvious disadvantages of arbitrary discrimination between consumers and the promotion of unnecessary inflation at later stages of production. A second alternative is to classify consumers into groups to each of which the price is different. The groups could be distinguished according to degree of essentiality of use. The least essential uses could then be charged the highest prices, the next least essential the next highest prices, and so on. This scheme involves extraordinary difficulties in the case of pricing of a basic material such as any of the chief metals or textiles which go through many stages of fabrication. Thirdly, the Government may purchase all of the increments of output which command differential prices above the ceiling and resell them at the ceiling price, taking whatever loss is involved, or the Government may pay subsidies amounting to the difference between the "purchase" price and ceiling price, an arrangement that is administratively simpler and is being used in the premium price plan for copper, zinc, and lead. Where the high-cost output goes to private consumers rather than government agencies, this is obviously the best arrangement. Especially is this so when the Government is allocating the total output. To the extent that government agencies buy the production directly, they may be charged the higher differential prices. Assuming that the Government uses the high-cost output it makes no difference, of course, whether the consuming government agency pays the high price or the purchasing government agency takes a loss in sale to the consuming agency. Finally, the Government might reserve for itself a needed portion of the lower-cost output and sell the remainder to the public at a selling price representing an average of the prices paid for all of the higher-cost increments. This would involve government purchase of the total output. This pricing scheme has the disadvantage of permitting more inflation in the general structure of prices than is desirable or necessary.

A differential pricing system operated by subsidy or purchase and resale at a loss is in effect in the cases of copper, zinc, lead, aluminum, nickel, and Chilean nitrates. Viewed narrowly, it appears that the Government "takes a loss" in these arrangements, yet it is obvious that, in terms of total supply, the nation has saved a considerable amount.[8] To this direct saving must also be added the savings in terms of prevention of pyramided price increases at later stages of processing and indirect inflationary influences on other industries.

Closely related to the problem of securing high-cost domestic production by non-inflationary means is the problem of handling high-cost imports. Here again it is desirable for the high-priced portion of total supply—represented by imports—to be handled separately from the lower-cost domestic supply, as an alternative to raising

[8] For example, in the illustration given in note 7, *supra*, the Government would have taken an apparent loss of $80 million if it had paid 25c a pound for the 400,000 tons which it resold at 15c. However, the purchasers would have saved $200 million, and the net saving to the nation would be $120 million.

the domestic base price to the level necessary to encourage importation of much needed material. A government buying agency which will purchase all imports requiring a price above the domestic base price and "take a loss" if necessary in reselling such material will save large amounts for the nation as a whole and help prevent inflation.

Another problem suggested earlier—that of stabilizing the prices of unstandardized items, such as metal castings, machinery, and machine shop products—is an exceedingly difficult one which taxes the ingenuity of the price authorities for a workable solution. A uniform fixed price for all producers is obviously not feasible, since no two producers make identical items. Similarly, the freezing of prices existing in a specified base period for each producer does not solve the problem completely, for such a technique takes no account of "tailor-made" items manufactured for the first time subsequent to the base period. The method actually used in a considerable number of such cases by the Office of Price Administration has been to freeze the pricing method or formula of a company so that any item produced for the first time after the base period is priced as it would have been priced in the base period. In order for such a method to function effectively as a curb on inflation, it requires freezing the "cost ingredients" of a producer's pricing formula, as of the base period, so that any subsequent increases in the prices of labor or materials must be absorbed.

Problems of a Broad Ceiling

Finally, there is the problem of techniques and criteria to be employed in administering a broad ceiling over the prices of a wide range of items manufactured or distributed by a large number of concerns. This is the task which the Office of Price Administration may have to undertake in the near future.

As indicated earlier, selective price control becomes inadequate as a means of achieving the objectives of war price control when inflationary pressures become generalized. By the end of the first quarter of 1942 it was apparent that the American economy was threatened by a mounting inflationary tidal wave. The only effective measure against such a deluge is a broad price freeze.

Such a broad freeze creates a formidable set of problems for the price agency. Much attention must be devoted to unscrambling various price abnormalities which happened to exist during the base period and hence became frozen into the price structure. A more important problem concerns individual and group hardships resulting from the uneven movement of related prices prior to the base date. These problems resulting from a general freeze require considerable changes in the price agency's operating methods, as well as modifications of the more detailed criteria discussed earlier. Obviously it is not administratively possible under a broad ceiling which covers thousands of commodities and millions of buyers and sellers to achieve the same intensive analysis of individual cases and the same detailed application of criteria that are feasible under narrower ceilings over fewer items. At the outset, at least, such a general price action must define whole classes of cases and develop

techniques and criteria for handling such problem groups, rather than designing tailor-made solutions to fit individual cases.

Some of the problems of administering a broad ceiling over retail prices may be reviewed briefly. The core of the problems at the retail level is the so-called "squeeze" which may result from a time lag between the upward movements of wholesale and retail prices. The frozen price for an individual retailer or a group of retailers for a particular commodity may reflect a normal mark-up over the cost of present inventories purchased some weeks or months before the basic freeze date, at wholesale prices which subsequently moved up and became frozen at higher levels. Where this is the case and retailers are faced with the prospect of higher cost to replenish stocks, they find their margins squeezed between the frozen wholesale and retail levels. Since in some cases there is no time lag and hence no "squeeze" and because, where these elements are present, they vary widely for different commodities and different retail outlets, there is no feasible technique for avoiding the whole problem in the initial imposition of the general freeze. Hence, there soon arise numerous cases requiring some form of adjustment, and it is here that the price authorities must design techniques and criteria for classifying and disposing of many individual and group problems expeditiously.

In seeking a solution for such cases, the one all-important objective of the program must be kept in mind: namely, that the general retail level of no commodity price should be allowed to rise. In other words, a price "freeze" must be taken literally if it is to be successful. Granting of exceptions which allowed consumer prices to rise would quickly result in undermining the whole program. Abnormalities may be resolved by permitting an individual retailer to raise his frozen price up to the level of his competitors' prices on the same commodity, but this does not entail any general increase in the retail price of the commodity.

Where a large number of retailers of the same sort are "squeezed," the solution must lie in the direction of "rolling back the squeeze," or some part of it, to their suppliers. "Rolling back the squeeze" would involve reducing the wholesale price to a point which would give the retailers an adequate operating margin. This could be accomplished in some instances by a voluntary reduction by the supplier, but it might require removal of the commodity from the general freeze and establishment of somewhat lower maximum prices by a separate price schedule.

"Roll back" problems may exist at other stages of production and distribution as the result of a broad freeze. The criteria discussed above may be used in distributing between the several stages the necessary amount of "roll back." A broad freeze would also be attended by special problems not encountered in setting specific schedules of maximum prices so that development of special criteria to handle these would be necessary.

Should situations develop in which margins according with the general criteria outlined above were impossible of achievement at all stages by means of the "roll back" process, then it might be necessary to inaugurate government purchase and

sale arrangements whereby cost relief could be give some concerns, thus making possible the maintenance of adequate margins at all stages. If such arrangements should become necessary they could be applied with greatest administrative efficiency at the manufacturing or material stages where the number of firms and products is less than in the distributive stages.

Closely related to "rolling back the squeeze" is the basic question of keeping particular kinds of concerns alive in the face of economic adversity. Surely no businessman or government official today nourishes the illusion that an all-out war can be conducted without severe economic hardships, which unfortunately do not fall upon each individual in accordance with his ability to bear them. It cannot be too much emphasized that the price agency can obviously not assume responsibility for all economic hardships resulting from war conditions. In the case of retailing, for example, the sharp curtailment of production of many civilian items is certain to shrink the physical volume handled by retailers in general and impose hardships particularly upon narrow-line retailers who formerly specialized in merchandise now curtailed, such as consumer durable goods. Here, as in the case of civilian goods manufacturers, the price agency should not be expected to stabilize profits.

The job is not one for government officials to handle alone. Much reliance must and can be placed upon the ingenuity of the American businessman to find ways of economizing on the various components of his goods or the attendant services, without seriously reducing the essential utility, so as to come out at least even. The price agency should aid the businessman in this endeavor; but it cannot rescue those who wish to rely entirely on government assistance. The problem of administering a broad price freeze is fraught with severe difficulties which can be overcome only by the highest degree of cooperation and understanding among businessmen, consumers, and Government. Government officials have the responsibility of making the spirit of regulations as clear as possible; individuals have the responsibility of conducting themselves in accordance with the defined intent of such regulations. Nothing could more effectively sabotage the whole war effort than a widespread effort of individuals to seek loopholes in the written words of regulations or to succumb to the temptation of cutting corners simply because the nation cannot spare sufficient manpower in the present crisis to police every individual action. Certainly the behavior of Americans generally in the war effort thus far affords hope for the success of our present battle against war inflation.

EMERGENCY RENT CONTROL

KARL BORDERS*

I. ECONOMIC AND SOCIAL CONSIDERATIONS LEADING TO RENT CONTROL LEGISLATION

The Executive Order of April 11, 1941,[1] establishing the Office of Price Administration and Civilian Supply, recognized the need for the development of programs directed towards the stabilization of rents. With the cooperation and assistance of the Rent Section of the Office of Price Administration, mayors and local defense councils appointed Fair Rent Committees in more than two hundred defense communities throughout the country between June 1941 and January 1942. These committees, through appeals to the community spirit of fairness, undertook to inhibit exorbitant rent increases. Their efforts were effective in thousands of individual cases, but they were wholly unable to reverse an upward rent movement for which there were basic social and economic causes deriving from the expansion of the defense program. The widespread activities of these committees did, however, assist materially in focusing local and national attention upon the need for statutory rent control.

Beginning early in the summer of 1940 the defense program created an unprecedented need for rental housing in areas within commuting distance of military establishments, shipyards, aircraft factories, ordnance plants, machine shops, steel mills, and other focal points of industrial production. For purposes of analysis, defense centers may be grouped by three types: (1) key industrial centers of pre-defense days whose activities were expanded by the practice of awarding defense contracts to areas where production facilities were readily available; (2) new centers of production located in non-industrial areas for reasons of military necessity or because of the availability of specific facilities; (3) communities near military establishments which previously did not exist or whose personnel has been vastly expanded.

Centers in the first category were not in a position to absorb the extraordinary

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[1] Executive Order, No. 8734, April 11, 1941, 6 FED. REG. 1917 (1941).

demand for housing, and beginning in the summer of 1940 they reported a steadily declining vacancy ratio. By the end of 1941, for example, in a number of large cities such as Detroit, Cleveland, Baltimore, Pittsburgh, Washington, and Louisville, less than one percent of all dwelling units were vacant, for rent and in a habitable condition[2]—a manifestly critical housing condition for large urban concentrations. As a consequence of the paralysis of the residential construction industry during the depression of the thirties, many industrial cities were not provided with a sufficient number of new dwelling units to replace normal demolition and obsolescence, let alone a sharp population increase. Even the marked upswing in residential construction which occurred from 1939 through 1941[3] failed to compensate adequately for the previous lag. The effects of the defense program thus began to be felt in many major industrial centers at a time when they were already suffering from an absolute deficiency of housing accommodations. Comparatively substantial vacancy ratios reported for many of these centers in the April 1940 Census were often deceptive indications of housing need, because they were the reflection of industrial conditions which were still depressed. As soon as employment expanded, families which because of unemployment or a low income status had previously "doubled up," were in an economic position to seek separate accommodations. In addition, the improvement in economic conditions during 1940 and 1941 caused a marked rise in the marriage rate, which further increased the demand for individual dwelling units.[4] And finally, a vast migration of workers to defense centers accentuated the pressure on existing housing facilities. Though no accurate estimates are available, a total movement of approximately three million persons to defense centers from the early summer of 1940 to the end of 1941 would not be an exaggerated figure.[5] A number of large cities have reported total population increases of at least 10%.[6] It was to be expected

[2] Vacancy surveys have been conducted in these cities from time to time by the Work Projects Administration, which released a summary of their surveys on January 26, 1942 (mimeo., No. A3909).

[3] NEW NON-FARM RESIDENTIAL CONSTRUCTION IN THE UNITED STATES*
(estimated volume)

Year	Number of new dwelling units constructed	Year	Number of new dwelling units constructed
1932	73,000	1937	300,000
1933	54,000	1938	347,000
1934	55,000	1939	465,000
1935	144,000	1940	540,000
1936	280,000	1941	615,000 (prelim.)
22-year average (1920-1941)			473,000

* Source: 1920-1935: David L. Wickens and Ray R. Foster, *Non-Farm Residential Construction, 1920-36*, NAT. BUREAU OF ECON. RESEARCH, BULL. 65, Table I, p. 2 (as cited in *Toward More Housing*, TNEC, Monograph No. 8 (1940) Table VI, p. 23); 1936-1941: Bureau of Labor Statistics.

[4] A consistently high correlation of marriage rates and economic activity has been shown by Virginia L. Galbraith and Dorothy S. Thomas in *Birthrates and the Interwar Business Cycles* (1941) 36 J. AM. STATIST. ASS'N 465.

[5] The total number of persons moving to cities of over 25,000 was estimated at 2,250,000 persons and 1,000,000 workers between October 1940 and October 1941, according to *Defense Migration*, W. P. A., mimeo., No. A3898, p. 7.

[6] Examples of such cities are: San Diego and Long Beach, Calif., Wichita, Kan., the Norfolk Area, Va.; and Seattle, Wash., as reported in *Defense Migration, supra* note 5, Table I, "Number of Migrant Persons and Migrant Rates."

that as the vacancy ratio in these industrial cities fell below 2% and stayed there, rents would increase, and continue to increase, unless controls were imposed.

When, for strategic purposes, ordnance plants, new shipbuilding centers, and army posts were established in non-industrial and rural areas (the second and third types of defense areas listed above), the impact of in-migrant labor and families of officers and enlisted men upon the available housing facilities was so sudden that the provision of the most elementary requirements for shelter involved the building of whole new communities. The number of in-migrants was sometimes as much as 1000% greater than available vacancies in the area, resulting in a complete, overnight change in the whole rent structure of such small communities.

The Inadequacy of Supply

The demand of new defense workers coming into an area is primarily for rental housing. A migrant defense worker has no desire to burden himself with home ownership. Various factors, which have been analyzed in great detail in the studies of the Temporary National Economic Committee, have not made profitable for private investors the erection of rental housing for the income level of most defense workers.[7] Furthermore, in many defense centers grave uncertainties as to the post-war industrial conditions of the locality have made new rental construction too great a risk. True, housing for sale, built with or without Federal Housing Administration insurance under the National Housing Act,[8] becomes a net addition to the housing facilities of an area; but this is rarely an immediate solution or even a significant palliative to the rental housing problem. The amount of such construction for sale is small, relative to the need. Rental dwelling units left vacant by the transfer of some tenants to ownership tenure do not necessarily fit the needs of in-migrant defense workers either in monthly rent, character of structure, or in location with respect to defense industries. In any event, considerable time must elapse before the full impact of these net additions to the housing market is felt in all rent ranges.

As priorities are imposed upon new residential construction, the net number of units which may be built even in defense areas is limited.[9] The allotment of priorities to a given defense area can rarely be as great as the community's absolute needs. To date only two cities, Washington and Los Angeles, are reported as having done any significant building for rent under the priorities regulations.[10]

Furthermore, when gross vacancy declines sharply in an area, there is a tendency for the banks, insurance companies, and government housing agencies to unload

[7] See *Toward More Housing*, TNEC, Monograph No. 8 (1940), pp. xvi, 41-102, 173-177, especially Chart XI at p. 48.

[8] Act of June 27, 1934, 48 STAT. 1246, as amended.

[9] See OPM, Div. of Priorities, Release No. PM 1192, Sept. 19, 1941. Priority rating is available in "defense housing critical areas" for housing built to rent for not more than $50 (shelter only) or to sell for not more than $6,000. See also Div. of Defense Housing Coordination, Release No. 12095.

[10] According to the Division of Defense Housing Coordination, defense housing priorities certifications had been made for 16,000 rental dwelling units between Sept. 22, 1941 and Dec. 1, 1941. Of these, 6,040 were in Washington and 2,209 in Los Angeles.

their foreclosed properties—temporarily rental housing—onto the sales market. Some cities within the past two years have reported the transfer of as much as 20% of their residential rental dwellings to home ownership.[11]

Government defense housing under the Lanham Act[12] has ameliorated conditions at crucial points, but in scores of defense areas building with these appropriations cannot be expected to provide sufficient units to supply the needs created by the national emergency.[13] At best, enough defense housing units can be constructed to provide minimum shelter for the necessary workers engaged in essential war production. The Government cannot undertake to construct a sufficient number of units to provide a competitive market in which the tenant will enjoy some choice. And without this power of selection, which requires a substantial percentage of vacant units, there is nothing to prevent an upward rental movement.

Attempts are being made to increase housing facilities through voluntary forms of rationing. The Homes Registration Service is sponsoring a program under which home owners and tenants with ample space are urged to rent single rooms to in-migrants. A general program of conversion and rehabilitation is also being developed by governmental housing agencies to yield more dwelling units. These plans, along with increased appropriations for defense housing, will help to alleviate the shortage but they cannot be expected to restore a competitive market which will insure rent stability.

Restrictions on automobile manufacture and the sale of tires will further aggravate the housing problem in and about key defense plants. Because of widespread use of the automobile, the normal housing market around a defense center, prior to the restriction, included communities situated 50 miles and more from the production center. In the future this radius will probably be cut drastically. Workers will have to live nearer their plants in order to use common vehicles. Many may have to find dwellings within walking distance. Pressure on the core of a housing market nearest the war industry will thus increase.

As the war program expands, the demand for rental housing in defense areas grows ever greater, and the supply remains relatively stable.

The Effect of Inflationary Rent Movements

The result of this increased demand for rental housing has been charted in about 177 localities where sample rent surveys have been undertaken at the request of the Office of Price Administration. Such surveys have been conducted by the Bureau of Labor Statistics and the research division of the Work Projects Administration. The

[11] The Bureau of Labor Statistics estimates that sales of rental property during periods ranging from 7 to 15 months have been 20% or more of the total sample in such cities as Baltimore, Md., Pontiac, Mich., and South Bend, Ind. Source: letter from A. F. Hinrichs, Acting Commissioner of the Bureau of Labor Statistics, dated Dec. 9, 1941.

[12] Pub. L. No. 849, 76th Cong., 3d Sess. (Oct. 14, 1940).

[13] As of Dec. 27, 1941, 184,429 dwelling units for defense housing were allocated from public funds. Of these, 73,012 were reported completed. Source: *Defense Housing Financed by Public Funds: Summary as of December 27, 1941*, Div. of Defense Housing Coordination, multilithed, Jan. 2, 1942.

following table[14] presents a frequency distribution of percentage increases in the total rent bill of selected defense communities on which reports are now complete. It should be noted that this percentage increase in the total rent bill is derived from units for which rents increased, remained stable, or were decreased.

RENT INCREASES IN CITIES OVER 50,000 IN POPULATION FOR PERIODS BETWEEN SEPTEMBER 1939 AND JANUARY 1942

Percentage Increase in Total Rent Bill	*Number of Cities Showing Such Increases*
3.0- 4.9	16
5.0- 6.9	17
7.0- 8.9	11
9.0-10.9	4
11.0-12.9	5
13.0-14.9	1
15.0-16.9	1
17.0 and over	1*
Total	56

* The total rent bill in this city increased 25.5%.

RENT INCREASES IN CITIES UNDER 50,000 IN POPULATION FOR PERIODS BETWEEN OCTOBER 1939 AND DECEMBER 1941

Percentage Increase in Total Rent Bill	*Number of Cities Showing Such Increases*
3.0- 6.9	50
7.0-10.9	26
11.0-14.9	10
15.0-18.9	5
19.0-22.9	10
23.0-26.9	6
27.0-30.9	5
31.0-34.9	1
35.0-38.9	1
39.0 and over	7*
Total	121

* Percentage increases in total rent bill in these cities were 94.9, 90.2, 57.7, 57.6, 45.9, 45.8 and 41.0.

The effects of rent increases of the magnitude indicated are clearly inconsistent with the general purposes of the Emergency Price Control Act:[15]

(a) Rent increases impede the effective prosecution of the war. Where exorbitant increases in the rental of housing accommodations take place, there results a high labor turnover detrimental to war production. Workers hesitate to accept employment in areas where they cannot obtain rental housing at fair and equitable rates.

(b) Rent increases give rise to demands for wage readjustments, which in turn contribute to the inflationary spiral. Rents normally consume about 20 percent of the

[14] Sources: Surveys by the Bureau of Labor Statistics and by the Work Projects Administration.
[15] Pub. L. No. 421, 77th Cong., 2d Sess. (1942) §1.

average wage-earner's income.[16] When, as a consequence of an acute housing shortage, there is an upward movement in rents, an abnormal proportion of the wage-earner's income is absorbed by the cost of shelter. Since this leads to a decrease in real wages and a lowering of the wage-earner's standard of living, it causes demands for increased wages.

(c) Rent increases may cause peculiar hardships to persons with relatively fixed and limited incomes—white-collar workers engaged in normal civilian activities and persons dependent on life insurance, annuities, and pensions—with the result that their standard of living is unduly impaired.

II. RENT REGULATION UNDER THE PRICE CONTROL ACT

Governmental regulation of rents charged for housing is not novel. A respectable body of legislative precedent may be found in this country as well as in foreign jurisdictions. Techniques vary, and the techniques permitted under the Emergency Price Control Act are unique in many respects. Rent regulation on the national scale provided for under the Act has never been experienced or attempted in the United States, but the Office of Price Administration has the tools to accomplish the task and has already begun to use these tools.

The discussion that follows will attempt to present a survey of rent control under legislation, omitting, so far as possible, treatment of related subjects covered elsewhere in this volume in connection with commodity price control, judicial review of administrative action, and enforcement matters.

Legislative Precedent

The first true legislative programs for rent control were originated upon the outbreak of World War I, in order to meet the emergency created by an acute shortage of low-rent housing. Every major European nation enacted some form of rent and eviction regulation, ranging from the authority given municipalities in 1919 to confiscate available dwellings in Czechoslovakia to the more elaborate controls imposed by Great Britain in 1915.[16a] In the United States regulation was not effectively introduced until after the war, although various limited measures had been attempted by some of the states as early as 1917.[17]

In general, four major types of rent control legislation have been employed in the United States and the British Empire. One of these, control through the operation of a rent commission, was first attempted in the District of Columbia under the

[16] *Family Expenditures in the United States,* NAT. RESOURCES PLANNING BD. (June 1941) Tables 3, 6, 7 and 8, pp. 2 and 3.

[16a] For descriptions of measures for the protection of tenants in 17 European nations, see *European Housing Problems since the War, 1914-1923,* INTERNATIONAL LABOUR OFFICE, STUDIES AND REPORTS, SERIES G, No. 1 (1924).

[17] These generally took the form of civil relief acts. In effect, the acts barred suits by landlords for possession. See Me. Laws 1917, c. 273; Mass. Acts 1917, c. 2. Congress also enacted a Soldiers' and Sailors' Civil Relief Act, which allowed a discretionary stay up to three months to the dependents of service men against whom dispossess proceedings had been brought for premises renting at $50 a month or less. Act of March 8, 1918, c. 20, 40 STAT. 440. This measure has been reenacted for dwellings renting at less than $80 a month. Act of Oct. 17, 1940, c. 888, 54 STAT. 1178.

Ball Rent Law,[18] enacted in 1919. This law created a commission of three members empowered to determine, upon their own initiative, or upon complaint, whether housing rents, charges, or services were fair and reasonable.[19] Enforcement of the eviction controls provided for in the statute resulted in the leading American case in the field, *Block v. Hirsh*.[20] This was a suit by a landlord to recover possession from a tenant who refused to vacate in reliance on the right given in the Act to continue in possession. The landlord argued that the Act was unconstitutional in that it deprived him of his property without due process of law, took his property for a private use and gave it to another without compensation. In finding for the tenant, the Court overruled the District of Columbia Court of Appeals which had found the law unconstitutional.[21] In a 5-to-4 decision the Supreme Court, through Justice Holmes, recognized the finding by Congress of an emergency and concluded that the business of renting had become affected with a public interest warranting police-power regulation.[22] The dissenting opinion was to the effect that the war emergency did not create any power to regulate, and it was unconstitutional to forbid the landlord his free choice of tenant and rental.

Three important jurisdictions, Massachusetts,[23] New Jersey,[24] and New York,[25] enacted generally similar statutes soon after the last war, which together make up the second major type of rent control legislation, *viz.*, providing to a tenant in an action for rent the defense that the rent charged is unreasonable and oppressive. The

[18] Act of Oct. 22, 1919, c. 80, tit. II, 41 STAT. 298 (1919).

[19] If the commission found that the rents, charges, or services were not fair and reasonable, it had the power to fix them to conform with these standards. In addition, tenants were permitted to continue their possession so long as they paid rent and otherwise complied with the terms of the tenancy; and they could not otherwise be evicted except in a few limited instances set out in the statute.

Two other laws were enacted in the United States delegating to commissions the authority to control rents. One was the ill-fated Wisconsin statute which gave to the Railroad Commission of Wisconsin the power to fix reasonable rents in any city in a county of 250,000 population or more, Wis. Laws, Spec. Sess., 1920, c. 16. Because of the population restriction, the law could apply only to Milwaukee, and on this ground it was ruled discriminatory in State *ex rel.* Milwaukee Sales and Investment Co. v. Railroad Commission, 174 Wis. 458, 183 N. W. 687 (1921).

The other commission was that created in 1921 by ordinance in Denver, Colorado. Apparently, this ordinance did not prompt any significant judicial opinion.

[20] 256 U. S. 135 (1921). [21] 50 App. D. C. 56, 267 Fed. 614 (1920).

[22] The emergency character of the Ball Rent Law was highlighted in Chastleton Corporation v. Sinclair, 264 U. S. 543 (1924). The Supreme Court reversed a judgment in favor of a tenant and remanded the case to the District Court for a trial on the facts as to whether the emergency had ceased. Later the same year, in Peck v. Fink, 55 App. D. C. 110, 2 F. (2d) 912 (1924), *cert. denied*, 266 U. S. 631 (1925), on the authority of the Chastleton case, the statute was held unconstitutional on the ground that the emergency had, in fact, passed.

[23] A Massachusetts act of 1920, Acts 1920, c. 578, covering dwellings other than hotel rooms, lodging houses, or rooming houses, created a presumption of unreasonableness in cases where the rent had been increased more than 25% over the rent as it existed a year prior to the time of the agreement under which the rent was being sought. Because it found that the housing emergency was continuing, the legislature did not permit this statute to expire until July 1, 1923.

[24] New Jersey legislation, Laws 1924, c. 69, §2, gave the tenant the right to use the defense of unreasonableness where the landlord sued to recover possession for nonpayment of rent, or where the landlord sought to recover for rent where there has been an increase within the year prior to the institution of the action. If it was shown that the rent had been increased 35% or more within the three years next preceding the beginning of the suit, the rent was to be considered by the court as prima facie unreasonable and oppressive.

[25] N. Y. Laws 1920, cc. 130-139, as amended by *id.* cc. 942-947.

Massachusetts and New Jersey legislation followed the pattern of Chapter 136 of the New York Laws of 1920.[26]

The constitutionality of this chapter was tested and upheld by the United States Supreme Court in *Edgar A. Levy Leasing Co. v. Siegel* and *810 West End Avenue, Inc. v. Stern*.[27] With three Justices dissenting, it was held that the standard of reasonableness is sufficiently definite to meet due process limitations of the Constitution.[28]

The third method of rent control, adopted by New South Wales in 1915,[29] was unique in that it set up "Fair Rent" courts to administer the law. In actual operation the Act was only applied in Sydney. Any lessor or lessee, not in default, could apply to the court to have the fair rent determined by it. All premises leased wholly or partially for residence, where the lease did not exceed three years or the rent £3 a week, were within the limits of the Act. A definite scheme was provided for determining the "fair rent," planned to take into account the unimproved value of the land, the cost of erecting a similar dwelling at the time of the application, and the interest to be allowed the landlord on the capital value, which was the total of the first two items. To this were added taxes, the amount annually required for repairs, maintenance and renewal, insurance, etc. An important proviso directed that, except where the court was convinced the circumstances rendered an increase just, the fair rent could not be higher than the prevailing rate at which the dwelling was let on January 1, 1915, exactly a year previous to the operative date of the Act.

In the present war, the expansion of war industries has resulted in a shortage of housing facilities in urban centers throughout Australia. While the control of rents was originally put in the hands of the individual state governments, the National Security (Fair Rents) Regulations for the Commonwealth were subsequently issued in order to empower those states lacking the requisite authority to control rents.[30] The Regulations applied not only to dwellings, but also to shops and factories, and whatever goods were leased in connection therewith. In line with the practice under the New South Wales Act of 1915, Fair Rent Boards were organized consisting of a Police Stipendiary or Special Magistrate, and two other members.

The fourth principal technique employed in rent regulation has been rent pegging by reference to a particular date, sometimes designated the normal rent date, or maximum rent date. That is, rentals higher than those received for the particular accommodations on a certain date in the past are prohibited. The rent on that date

[26] In September, 1920, Chapter 136 was amended in several respects by N. Y. Laws 1920, c. 944.

[27] 258 U. S. 242 (1922).

[28] The method for determining a reasonable rent under this Chapter is outlined in Hall Realty Co. v. Moos, 200 App. Div. 66, 192 N. Y. Supp. 530 (1922). In Hirch v. Weiner, 116 Misc. 312, 190 N. Y. Supp. 111 (1921), the court ruled that a landlord is entitled to a 10% net return on the value of his property; but in Jash-Lap Realty Co., Inc. v. Fishman, 115 Misc. 485, 190 N. Y. Supp. 117 (1921), the court held the issue one of fact for the jury on the ground that there can be no definite rule as to what is a reasonable rent, since conditions necessarily vary.

[29] New South Wales Acts 1915, No. 66. In 1920 South Africa adopted legislation like that of New South Wales. For a discussion of the latter, see Evatt, *A "Fair Rent" Experiment in New South Wales* (1920) 2 J. OF COMP. LEGIS. & INT. L. (3d. ser.) 10.

[30] Stat. Rules 1941, No. 62, March 25, 1941, as amended by Stat. Rules 1941, No. 71, April 2, 1941.

is established as the maximum lawful rent. Ample precedent for legislation of this character is provided by the relatively long experience of Great Britain with rent restriction. Dating from the Act of 1915,[31] the legislation was continued without interruption. In general, increases above the "standard rent" were made irrecoverable; that is, the rent payable on August 3, 1914, was set as a maximum; or if the property was then vacant, the last previous rent, or if rented for the first time after that date, the rent first agreed on by the landlord and tenant was to be the maximum.

Although this English Act had been drafted as a wartime measure, post-war economic conditions necessitated the continuance of rent control. In 1920 a Rent Act[32] was passed consolidating several laws enacted since 1915 and this has come to be known as the "Principal Act" of a series of subsequent enactments designed to give the occupants of certain residential properties security of tenure. By virtue of the latest statute,[33] September 1, 1939 is now the "standard rent" date and the restrictions are extended to cover dwellings rented by those with substantial incomes. These Acts have provided regulations, schedules and standard forms of notice with which the landlord must comply in the determination of rent on controlled property.

In Canada, rent control during the present war dates from September 11, 1940.[34] On that day, the War Time Prices and Trade Board was given the same control over rents it had been exercising over prices since September 3, 1939. In the earlier cases brought under control in Canada, the rentals paid January 2, 1940 were established as the maxima.[35] Later, the date was fixed at January 2, 1941,[36] for areas not previously controlled, and now in all other areas, no oral or written lease for any commercial or housing accommodation, furnished or unfurnished, may legally be made at a rental higher than that payable under the lease in effect on October 11, 1941, unless an application is made and approved by the local committee.[37] Such an application may only be made on the basis of new circumstances arising since October 11, 1941, which are confined to limited types of cases.[38]

The District of Columbia Emergency Rent Act,[39] passed on December 2, 1941, was also predicated on the theory of the rent date. This law, effective January 1, 1942, prescribes in general that the maximum rent for housing accommodations is to be that to which the landlord was entitled on January 1, 1941. If the accommodations were not rented on this date but had been rented at some time during the year immediately prior, the rent is to be that of the most recent letting, but if there has been no letting either on the maximum rent date or within the year previous

[31] 5 & 6 GEO. V, c. 97.
[32] 10 & 11 GEO. V, c. 17.
[33] 2 & 3 GEO. VI, c. 71.
[34] Order-in-Council, P. C. 4616, Sept. 11, 1940.
[35] Order-in-Council, P. C. 5003, Sept. 24, 1940.
[36] Order No. 33, Wartime Prices and Trade Board, Feb. 14, 1941.
[37] Order-in-Council, P. C. 8965, Nov. 21, 1941.
[38] Examples are: substantial increases in taxation, or operating costs, or a substantial expenditure for structural alterations or additions, or a substantial increase in the wear and tear caused by the tenant, or a substantial divergence between the fixed rent and that charged for similar housing accommodations in the same area. The Canadian legislation specifically rejects the principle of fixing rentals at levels designed to give property owners a fair return on their investment.
[39] Pub. L. No. 327, 77th Cong., 1st Sess. (Dec. 2, 1941).

thereto, the rent is to be that generally prevailing for comparable housing accommodations as determined by the Administrator of Rent Control, an office created in the Act. Provision is made for a general adjustment of the maximum rent ceiling by the Administrator to compensate for a general increase or decrease since the maximum rent date, in taxes or other maintenance or operating costs relating to all accommodations or to any particular class of accommodations. In addition, the individual landlord or tenant may petition the Administrator to adjust the rent ceiling applicable to his accommodations so that peculiar conditions affecting him may be taken into account and proper allowance made. The landlord may seek an adjustment to compensate for a substantial rise in taxes or maintenance or operating costs, or for a substantial capital improvement or alteration; or, the tenant may petition for a reduction on the ground that the maximum rent ceiling permits an unduly high rent.[40]

Rent Provisions of the Act

Authority to control rents stems from the language of subsection (b) of Section 2, the section devoted to prices, rents, and market and renting practices. The Administrator's rent control authority may be exercised within "defense-rental areas," defined to include the District of Columbia and "any area designated by the Administrator as an area where defense activities have resulted or threaten to result in an increase in the rents for housing accommodations inconsistent with the purposes of this Act."[41] In the earliest version of the Price Control Bill[42] placed before the House Committee on Banking and Currency, accent was laid on whether defense activities had resulted or threatened to result in a rental housing shortage. Members of the Committee disclosed by their interrogation[43] of witnesses that they might consider a defense-rental area co-terminous with so-called defense-housing areas proclaimed by the President under the National Housing Act.[44] While such proclamations are indicative of a deficiency of accommodations, and incidentally indicate a tight rental market, the considerations entering into the selection of localities for defense-housing need not be binding on the Administrator in his selection of areas requiring rent regulation.[45] Mr. Henderson testified before the House Committee that, in his opinion, the test is whether or not rents have been affected by the defense effort.[46]

[40] *Id.*, §§3, 4.

[41] Pub. L. No. 421, 77th Cong., 2d Sess. (Jan. 30, 1942), §302(d).

[42] H. R. 5479, S. 1810, 77th Cong., 1st Sess. (Aug. 1, 1941).

[43] *Hearings before the House Committee on Banking and Currency on H. R. 5479, superseded by H. R. 5990*, 77th Cong., 1st Sess. (1941) (hereinafter referred to as *"House Hearings"*) 413, 612-13.

[44] 48 STAT. 1246, c. 874, as amended, 12 U. S. C. A. §1738 (Supp. 1941).

[45] A separate finding is necessary. *House Hearings* 413.

[46] *Id.* 962. Representative Dirksen proposed, in the course of debate on the floor of the House that "defense-rental area" be defined as: ". . . any area designated by the Administrator as an area where defense activities have resulted in a substantial general increase in the rents for housing accommodations inconsistent with the purposes of this Act and where a housing shortage has been evidenced by the area being designated for the grant of priorities or allocation for building materials which are upon the critical list of such materials." 87 Cong. Rec., Nov. 28, 1941, at 9482. By rejecting the amendment the House specifically put aside any test dependent exclusively on the proclamation of defense-housing areas issued under the authority of the National Housing Act.

The advisability of confining rent control to "defense-rental areas" occasioned considerable controversy among the legislators.[47] Industrial activity was still on a defense basis when the House and Senate Committees came to consider the language of the Act. The proponents of the Gore Bills[48] and the Baruch plan generally, favored abolishing any restrictions on the scope of the rent control program.

Section 2(b) directs that the Administrator may establish maximum rents within a defense-rental area if, within sixty days after the issuance of his recommendations, rents have not been stabilized or reduced by local action in accordance with these recommendations. The first opportunity to handle the situation is given to the locality involved.[49] Whether or not the Administrator will act after an attempt at local regulation through state legislation or otherwise, may be made dependent on some objective test of the actual results of such a program with respect to the realization of the Administrator's recommendations.

The broad and simple language of Section 2(b) affords a blueprint for the course of administrative action. Since the Administrator may exercise his authority to control rents within defense-rental areas, the first step toward control is the designation of the area. This may be coincident with, or antecedent to, the "declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents." The subsection does not indicate that recommendations are to be addressed to any specific authority. Nor does the legislative history of the bill indicate any intention on the part of Congress that the recommendations need be specific.

A statement of considerations is required[50] when the maximum price of a commodity is established, but is not required in the regulation of rentals. The Administrator's declaration stating the necessity for stabilization or reduction of rents in a given area is somewhat analogous to a statement of considerations, but is not to be confused with the latter.[51] With respect to rents, it seems sufficient under the statute simply to state the need for regulation.

The actual establishment of maximum rents by regulation as provided in the Act, is contingent on the effectiveness of local action, if any local efforts have been made. Where local action is not instituted, or fails to effectuate his recommendations, the Administrator may establish maximum rents by regulation or order.

A definite standard to guide administrative action in establishing maximum rents is found in Section 2(b).[52] That standard is expressed in terms of a date and, as

[47] 88 Cong. Rec., Jan. 7, 1942, at 83; *id.*, Jan. 27, 1942, at 719.

[48] H. R. 5760, H. R. 5997, H. R. 6086, 77th Cong., 1st Sess. (1941).

[49] *House Hearings* 613, 614.

[50] §2(a): "Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order."

[51] See Ginsburg, *The Emergency Price Control Act of 1942: Basic Authority and Sanctions*, *supra* at 31.

[52] *Cf.* §2(a): "So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judg-

has already been pointed out, is not novel.[53] The bill first introduced[54] did not employ this standard, but merely required that rents should be fixed so as to effectuate the purposes of the Act. As reported out of the House Committee, Section 2(b) imposed on the Administrator the condition that he consider "rents prevailing for the accommodations, or comparable accommodations, on or about April 1, 1940." One of the factors leading to the choice of the April 1, 1940 date was that considerable rent data had been gathered by the Census Bureau as of that time.

The Administrator was also directed to consider increases or decreases of general applicability in property taxes and other costs occurring during and subsequent to the year ending on April 1, 1940 with respect to housing accommodations within the defense-rental area involved.

It was pointed out on the floor of the House[55] that the April 1, 1940 date could serve as a bench mark from which to consider the current rent level.[56] However, the Senate added an amendment making the base period for rents April 1, 1941 except where defense activities had already resulted in increases inconsistent with the purposes of the Act. In such a case the base period was to be the period on or about the most recent date which did not reflect such increases. In any event, this was not to be earlier than April 1, 1940. The Act effects a compromise between the House and Senate versions in that it provides that if rents for housing accommodations in a defense-rental area had not increased or threatened to increase in a manner inconsistent with the purposes of the Act as of April 1, 1941, the Administrator has the power to fix rents on a date later than April 1, 1941. It appears, therefore, that while the suggested statutory base date is April 1, 1941, the base period may be any time between April 1, 1940, and the date on which the Administrator takes action.[57]

In establishing upper limits on rent charges the Administrator is to set maximum rents which will be "generally fair and equitable and will effectuate the purposes of this Act." The Administrator is also directed to make adjustments for relevant factors of general applicability, "including increases or decreases in property taxes and other costs."

The date standard has been adopted as an integral part of the price and rent control machinery because it affords a ready administrative method of accomplishing a proper legislative purpose in a generally fair and equitable manner. Adjustments are in order where the over-all rent picture demands them. Were the Administrator compelled to treat every rental transaction separately and conduct inquiries into "fair return" on "investment value," and were he required to evolve a complex formula patterned after public utility rate fixing procedures,[58] the rent control program could

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ment of the Administrator, the prices for such commodity are generally representative, for the commodity or commodities included under such regulation or order. . . .)"

[53] See pp. 114-115, *supra.*

[54] H. R. 5479, S. 1810, 77th Cong., 1st Sess. (Aug. 1, 1941).

[55] 87 Cong. Rec., Nov. 24, 1941, at 9309.

[56] See note 52, *supra.*

[57] 88 Cong. Rec., Jan. 27, 1942, at 719.

[58] Representative Dirksen did submit an amendment which was calculated to comprehend all the data of the public utility rate procedure: "When rents have been established as is herein provided, the same

not keep pace with the emergency and would probably bog down in much the same way as did the New York and District of Columbia rent control programs after the last war. The dangerous inflationary tendencies of a war economy will not wait on cumbersome, time-consuming preventives. This is not to say that a direct, frontal attack on inflationary rents must perforce compel landlords to operate at a loss. The use of the date principle is demonstrably reasonable. It recognizes, and continues in effect, the conditions of a freer market, created in the recent past through the normal processes of economic bargaining of landlords and tenants. Present rental market conditions in a great many localities can no longer be considered normal.

Because the threat of dispossession is the most powerful compulsion which a landlord may exert to influence and coerce his tenant, any effective rent control program must comprehend a plan for the regulation of evictions. Section 2(d) of the Price Control Act authorizes the Administrator, whenever such action is necessary or proper in order to effectuate the purposes of the Act, to regulate or prohibit renting or leasing practices, including evictions, in connection with any defense-area housing accommodations. Such practices are to be controlled when, in his judgment, they are equivalent to, or are likely to, result in rent increases inconsistent with the purposes of the Act. It might be pointed out that this subsection is couched in unprecedentedly general language in comparison with the eviction controls of previous statutes.[59] On the basis of the authority granted the Administrator by these sections, it was contemplated that he would promulgate regulations consistent with the purposes of the Act and calculated to effectuate those purposes. Although Congress itself, by passing the Ball Rent Law[60] and the Saulsbury Resolution,[61] furnished precedents for stringent controls, the first draft of the bill considered in the Congress lacked any reference to eviction controls. It was recognized early in the course of the hearings before the House Committee,[62] based on the experience under earlier

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shall be adjusted upward or downward upon the application of the owner or the tenant so as to produce a gross rental which after payment of taxes and other costs of ownership, management, and operation, including depreciation and an allowance for vacancy, will provide a net return which is reasonable upon the value of the property." 87 Cong. Rec., Nov. 28, 1941, at 9447. As Representative Dirksen himself proceeded to explain, this amendment was designed to remedy whatever inequities a rent ceiling might conceivably engender. However, he withdrew his amendment in favor of another proposed by Representative Patman, which, though accepted by the House, was dropped by the Senate Committee on Banking and Currency.

[59] A characteristic of the emergency landlord-tenant laws passed for the District of Columbia, and the post-war laws enacted in New York has been the over-all restraint on evictions. Indeed, the first legislative attempt to curb rent profiteering in the District of Columbia during the last war was embodied in the Saulsbury Resolution, Act of May 31, 1918, 40 STAT. 593 (1918), drafted solely for the purpose of continuing tenants in possession for the duration of the war with certain limited exceptions.

Stated broadly, these local laws have prohibited eviction or dispossession generally, regardless of the terms of any lease or contract, except where there has been a default in the payment of rent, or the tenant has committed a nuisance, or has used the premises for illegal or immoral purposes, or where the landlord seeks the premises for immediate occupation by himself or a member of his family, or where he plans to make substantial alterations to the dwelling, or plans to raze the property and replace it with new construction.

[60] Act of Oct. 22, 1919, c. 80, Title II, 41 STAT. 298 (1919).

[61] Act of May 31, 1918, c. 90, 40 STAT. 593 (1918).

[62] *House Hearings* 960.

statutes, that resort to dispossess proceedings by persons seeking to evade the legislative purposes would compel the inclusion of powers to enforce appropriate sanctions against such disruptive practices.

Administrative experience under the Executive Order setting up the Office of Price Administration, as well as the history of other rent control programs led to the inclusion in the Act of subsection (b) of Section 4, which deals with prohibitions generally. When tenants sought protection from Fair Rent Committees cooperating with OPA, some landlords had been quick to thwart committee action by instituting eviction proceedings. To deny the availability of the eviction weapon for this purpose, it was specifically made unlawful to evict a tenant or to refuse to renew his lease on account of action taken by the tenant, or which he proposed to take, under the authority of the Act.

Effective rent regulation is also threatened from another quarter. It is obvious that the fixing of a maximum rent will be little more than an empty gesture if landlords are free to cut down, or eliminate services bargained for in the leasing agreement, or furnished as of the date establishing the rent. Because "housing accommodations" are defined in the Act to include "privileges, services, furnishings, furniture, and facilities" connected with the use or occupancy of rental property, these adjuncts of the property may be brought within the regulatory ambit. In the normal case a reduction in services without a compensating reduction in rent is tantamount to a rent increase.

When it is recognized that services comprise a part of the consideration in most rental agreements, it is not surprising that the Supreme Court rejected a contention made in a leading case[63] which arose under the New York Housing Laws of September 1920 that to compel the continuance of services would be to violate the 13th Amendment. Justice Holmes ruled that services are a necessary accompaniment of the modern dwelling, and that certain services are inherent in ownership. It would seem to make no difference whether the Administrator compels new services or requires a continuation of the old. It may be pointed out that in practice questions of involuntary servitude are likely to be academic, inasmuch as the Act specifically provides in Section 4(d) that a lessor cannot be compelled to offer housing accommodations for rent.

Along with the other sanctions[64] available to the Administrator for the enforce-

[63] Marcus Brown Holding Co. v. Feldman, 256 U. S. 170 (1921).

[64] Section 205(a) provides that the Administrator may apply for an order enjoining practices which constitute or will constitute a violation of the Act. Subsection (b) specifies the criminal penalties to which violators of the Act are liable. Subsection (e) reads: "If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action

ment of rent control, Section 205(f), granting the power to issue or require a license as a condition to the selling of commodities, is also applicable to renting. Section 205(e) provides that "for the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity." It follows, therefore, that, wherever the latter phrase appears in Section 205, rental transactions are subject to the same controls as commodities. The authority to license rental transactions will insure effective control in those cases where the use of this administrative expedient proves advisable.

Initial Action by the Administrator

The first official action taken by the Office of Price Administration under the rent control provisions of the Price Control Act is already history. On March 2, 1942, the Administrator, acting under Section 2(b) of the Act, designated twenty "defense-rental areas" as areas where "defense activities have resulted in an increase in the rents for housing accommodations inconsistent with the purposes of" the Emergency Price Control Act of 1942.[65] The localities embraced in these designations included twenty groups of communities in thirteen states.[66] Each designation was accompanied by a "declaration" stating generally the necessity for the stabilization and reduction of rents in the areas affected, and containing the Administrator's recommendations as to the type and degree of stabilization and rent reduction necessary to establish rent levels consistent with the purposes of the Act. In all but six of the twenty areas it was recommended that the rents for housing accommodations be stabilized or reduced to the level prevailing on April 1, 1941.[67]

The rent declarations also recited that if the recommendations were not effectuated within sixty days after their issuance, the Administrator could by regulation or order establish maximum rents under the provisions of the Price Control Act.

The issuance of these rent declarations was accompanied by press releases summarizing their provisions and containing statements of the Administrator stressing the urgent need for rent regulation.[68]

Shortly after the issuance of the first twenty rent declarations, the Office of Price Administration made available to the public through the press an explanation, in question-and-answer form,[69] of the basic rent control provisions of the Price Control Act. This action may be the forerunner of considerable effort on the part of the Office of Price Administration to educate the public with respect to the rent control program and its operation and effect in various situations. It is generally recognized that complete understanding of the purposes of the program and full cooperation on the part of those affected by it are vital to its success.

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under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act."

[65] 7 FED. REG. 1675-1695 (1942).

[66] On April 2, 1942, the Administrator designated the City of Baltimore and its environs a defense-rental area and accompanied the designation with a rent declaration, 7 FED. REG. 2598 (1942).

[67] In four areas the date selected was Jan. 1, 1941; in two others, the date was July 1, 1941.

[68] Press Releases Nos. PM 2606, March 3, 1942, and PM 2852, April 3, 1942.

[69] Press Release No. PM 2628, March 6, 1942.

LEGAL AND ECONOMIC PROBLEMS OF CIVILIAN SUPPLY

JOSEPH L. WEINER*

I

The impact of the war on the civilian economy of the United States is just beginning. Apart from automobiles and tires, large inventories have cushioned the blow of the inevitable shortages resulting from increased war production. From foreign experience, however, we know that goods available for civilian use will be greatly reduced—especially goods made from materials which are necessary for war production. Our own forecasts based on extensive economic data and our short experiences lead to the same conclusion. Careful allocation and rationing of the limited supply of goods is already necessary in some cases and will become increasingly prevalent. Curtailment of the comparatively unessential use of scarce materials will be imposed upon the civilian population. However, the supply of goods available for civilians cannot be reduced beyond a certain point without having adverse repercussions on war production itself. For the war effort itself is dependent upon civilians who sustain it. And the health and efficiency of these civilians depend in turn upon a basic supply of necessary civilian goods.

The civilian economy, of course, is not separate and independent. It is vitally integrated with our military economy. The war program is, after all, an over-all plan for making our total economy function efficiently during time of crisis. And although we refer to civilian supply and needs, it must be borne in mind that they overlap into military supply and needs.

The start of a great armament effort is bound to be confusing, especially when recovery from a previous depression has not been complete. Our so-called "defense" period was born under these circumstances. Germany, it is true, started arming in a period of depression; but because Hitler deliberately planned to put his country into war, he used all of Germany's unemployed resources to produce armaments and put a top on the civilian standard of living at the lowest level of the depression. In America, on the other hand, because we hoped that all-out war would not be necessary, we allowed our early military expenditures to have a "pump-priming" effect. Hence, during the first half of last year military and civilian production expanded side by side until unprecedented levels of civilian production were reached. Now,

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however, we are in an all-out war. Actual and imminent shortages of vital raw materials mean that we must conserve these materials for military production. Productive facilities must be converted to necessary military production. Therefore, many of the industries which have been allowed to reach new highs of civilian production in recent months must be contracted even more rapidly than they expanded. It is inevitable that confusion should attend the rapid upswing and the even more rapid downswing of a sizeable portion of civilian production. Of course, if we had been able to continue to expand both our military and civilian production, the level of the civilian standard of living might have been maintained or not reduced as drastically. But now—we must place military needs first. Since our entry into war, expansion of necessary military production has consumed our total efforts.

As the raw materials and productive capacity of the country are appropriated for military production, an inevitable reduction of production of civilian goods must take place. For example, after military requirements for steel have been met, the reduced amount of available steel means that not all steel products being made today for civilian use can continue to be made. These shortages of raw materials and the increasing necessity for more military production facilities raise problems of allocation. Some end-products of steel are more essential to the civilian population than others. In fact, some steel end-products are absolutely essential to the civilian economy. Unless there is some type of planned allocation of the steel supply to the essential end-products, haphazard dissipation of our limited steel supply upon nonessential goods may occur. Allocation or rationing of these goods among the consumers, therefore, becomes necessary to ensure efficient prosecution of the war.

II

In general, allocation of resources is a continuing problem which must be met quite as much in peacetime as in wartime. We have this problem of allocation—which is the basic economic problem—because we would all like to consume more goods and services than are available. Every economic system, therefore, faces and must solve, in some fashion or other, the problem of deciding which of the infinite variety of desirable goods and services we shall use our available land, labor, and capital to produce. In short, every economic system must solve the problem of allocating scarce factors of production between alternative uses.

Generally, in a system of free enterprise scarce resources are allocated, by means of the price system, to the satisfaction of the things for which there is a money demand. Of course, even in the heyday of *laissez faire* there were some restrictions on anti-social consumption; for instance, we restricted the production of such commodities as drugs, alcoholic liquor, pistols, and adulterated food, even though a money demand existed for them. Restrictions have also been placed on the use of some of the factors of production. Thus, the hours of women and children, and now men, have been regulated; wasteful exploitation of our petroleum resources has been restricted; and controls have been placed on the flotation of capital issues. Despite

these restrictions and the mutations of the free enterprise system introduced by the growth of monopolies and the fluctuations of the business cycle, our available supplies of land, labor, and capital are still, generally speaking, allocated to produce the goods for which there is the greatest money demand.

In normal times an increase in demand relative to supply led to an increase in price; this allocated the available supply to the highest bidder by cutting off the purchases of those unwilling or unable to pay the higher price. Allocation in peacetime is thus normally based on the price system. However, in wartime we do not allocate the factors of production and distribution solely in accordance with the determinations of the price mechanism. Departure from price allocation is caused by a changed environment created by the war crisis. The production task is so monumental and crowded into such a short space of time that the price mechanism becomes ineffective. The price mechanism is wasteful and inefficient as an allocator during the critical period of war.

For one thing, in wartime we cannot afford to have health and efficiency distributed in proportion to income. Yet that is the result of reliance upon price allocation alone. Thus, if we allowed the price of sugar to rise, the demand would ultimately boost the price to a high level. The per capita consumption of sugar by those with low incomes would drop accordingly. While that might not be important in the case of a single commodity, it would clearly be undesirable if it extended to many of our basic foods. It would lessen both the efficiency and morale of our civilian population needed for the war effort. In addition, the inflationary tendencies resulting from increased demand for the limited supply of civilian goods hinder and obstruct the war effort. Therefore, the Government has fixed a ceiling price for sugar and has begun to ration the supply of sugar in a fair and equitable manner among consumers. To help meet the food needs of the civilian population, the Government has subsidized the farmer to stimulate an increased supply of food. In addition, it has marketed food through the grocer under the federal surplus marketing agency and distributed food through community kitchens in order to serve the food needs of large sections of our population.

Conversion to military production is the great need of the time. And time is precious. Under the traditional price system, conversion would take place whenever the plant management decided that the bid for military production was sufficiently profitable and otherwise attractive to warrant the change over. Obviously, traditional price allocation is not well designed to speed conversion.

Price allocation produces waste too when our economy must conserve every ounce of strength. Thus, the bargaining power of large purchasers tends to exert such pressure on producers of raw materials that smaller purchasers, whose products may be more necessary to the war effort, cannot buy necessary materials. Thus, the automobile business of a steel company is so important business-wise that the favor of such a large customer is likely to be retained by the steel company at the expense of

smaller customers, although they may actually be making products which are more important to prosecution of the war than passenger cars.

Allocation based on price determination is clearly not geared to the break-neck speed of a war economy. Consequently, planned allocation and direct price control have been substituted. Direct price control and planned allocation are supplementary governmental methods calculated to expedite and prosecute the war effort. Even when prices are legally imposed by a governmental agency, the problem of allocating the limited supply of a commodity becomes acute, because it is no longer possible to eliminate potential purchasers by means of a rise in prices. As a result, the distribution of the scarce commodity is likely to become quite erratic. It may be sold on a first-come-first-served basis; or the seller may limit each customer to some portion of his previous use, irrespective of the relative importance of the various uses. In such a situation it is possible for the relatively unessential uses to get most of the supply, if, as in the case of steel, the relatively unessential uses are also the largest uses. Inevitably, as the experience of other countries and of this country in the last war demonstrates, planned allocation of materials and products, where necessary, must be instituted. Thus, government enters the field of civilian supply.

III

The recognition of this need, through official action, was gradual, although the thought was never far away. The first step was taken on May 29, 1940, when President Roosevelt, acting under authority of a statute passed in 1916,[1] created the Advisory Commission to the Council of National Defense.[2] The work of three members of the Commission in charge of Consumer Protection, Price Stabilization, and Agriculture was related to the problems of Civilian Supply. Congress too showed increasing awareness of some of these problems and passed the Priorities Act which was approved by the President on June 28, 1940.[3] This Act laid the foundation for subsequent priority and allocation programs.

Approximately seven months after the creation of the Advisory Commission to the Council of National Defense, on January 7, 1941, the President issued an Executive Order No. 8629[4] establishing the Office of Production Management (OPM). Within OPM a Priorities Board of six members was created. This Board was directed by the President to "make findings and submit recommendations with respect to the establishment of priorities," and was directed to "take into account general social and economic considerations and the effect the proposed actions would have upon the civilian population." Thus, the problems of civilian supply began to crystallize as the defense program took shape.

The emphasis of the work of the Priorities Board was on defense. Whatever was required for defense was taken for defense; only what was left over was available for civilian use. At first, when defense requirements were relatively small, systematic

[1] 39 STAT. 649 (1916), 50 U. S. C. §2 (1934).
[2] 5 FED. REG. 2114 (1940).
[3] 54 STAT. 676 (1940).
[4] 6 FED. REG. 191 (1941).

allocation of the residual supply among competing civilian demands did not seem necessary and was not attempted. But as defense requirements expanded, it became clear that the available materials were not being distributed in the most equitable and efficient way.

To meet this situation the President on April 11, 1941, created by Executive Order No. 8734[5] the Office of Price Administration and Civilian Supply (OPACS). OPACS was ordered to "Take all lawful steps necessary or appropriate in order . . . (3) to stimulate production of the necessary supply of materials and commodities required for civilian use . . . and (4) after the satisfaction of military defense needs to provide, through the determination of policies and the formulation of plans and programs, for the equitable distribution of the residual supply of such materials and commodities among competing civilian demands." To carry out this responsibility, there was created within OPACS a Division of Civilian Supply, headed by an Associate Administrator.

The Division of Civilian Supply remained within OPACS until August 28, 1941. On that date the President, by Executive Order No. 8875,[6] created the Supply Priorities and Allocations Board (SPAB) and transferred the Division of Civilian Supply to OPM.

This transfer of Civilian Supply from OPACS to OPM had little effect on the actual workings of the governmental machinery concerned with Civilian Supply. The Administrator of OPACS, now OPA, became the Director of the Division of Civilian Supply, now of OPM, and the Associate Administrator became the Deputy Director. The work of Civilian Supply had been clarified meanwhile by the passage of the Vinson Act[7] which gave the President priority and allocation powers over shortages in the supply of any material for civilian purpose. The groundwork for Civilian Supply programs was thus laid. And successive executive orders relating to the defense organization were increasingly detailed and acute with respect to civilian supply problems. Most recently, the replacement, on January 16, 1942, of OPM and SPAB by the War Production Board (WPB)[8] has not resulted in any material changes in the operations of the Division of Civilian Supply, except that WPB in turn has delegated to OPA the equitable rationing of products at the retail level.[9]

IV

The agency of Civilian Supply operates within a legal framework. The President of the United States, under his constitutional power as Commander-in-Chief of the Army and Navy and under the powers vested in him by a number of statutes (some adopted currently and some still on the books from World War I) has comprehensive authority over the allocation of materials in time of emergency.

[5] *Id.* 1917. [6] *Id.* 4483.

[7] Pub. L. No. 89, 77th Cong., 1st Sess. (May 31, 1941), 55 STAT. 236, amending 54 STAT. 676 (1940). The text of the amended Act appears in 41 U. S. C. A. (Supp. 1941), p. 144 n, and 1 C. C. H. War Serv. ¶30721 (1942).

[8] 7 FED. REG. 329 (1942).

[9] WPB Directive No. 1, Release No. WPB-52, Jan. 27, 1942.

The functions of the Division of Civilian Supply stem in large part from the Priorities Act of June 28, 1940,[10] as amended May 31, 1941.[11] The Priorities Act of June 28, 1940, authorized the President, in his discretion, to accord priority to deliveries of material pursuant to orders of and contracts with the Army and Navy over deliveries for private account or for export. Obviously this priority power was too narrow. It was broadened when Congress amended the Priorities Act by legislation called the Vinson Act on May 31, 1941.[12] The heart of the Vinson Act reads as follows:[13]

Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material for defense or for private account or for export, the President may allocate such material in such manner and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

The Act further provides:[14]

The President may exercise any power, authority, or discretion conferred on him by this section, through such department, agency, or officer of the Government as he may direct and in conformity with any rules and regulations which he may prescribe.

The power of delegation thus given to the President was exercised by him in the Executive Order of August 28, 1941.[15] By that order, the President conferred on OPM, "subject to such policies or regulations as the Supply Priorities and Allocations Board . . . may from time to time determine," the power to "perform the functions and exercise all the power, authority, and discretion conferred upon the President by Public No. 89, 77th Congress, First Session, approved May 31, 1941" (the Vinson Act).

In this executive order dated August 28, 1941, it was provided in part:

5. Consistent with the basic defense policies of the President, the Supply Priorities and Allocations Board shall:

(a) Determine the total requirements of materials and commodities needed . . . for . . . civilian . . . purposes; establish policies for the fulfillment of such requirements. . . .

(b) Determine policies and make regulations governing allocations and priorities with respect to the procurement, production, transmission, or transportation of materials, articles, power, fuel, and other commodities among . . . civilian . . . demands of the total defense program."

To the Office of Production Management was given the duty of formulating plans and programs providing for allocations and priorities with respect to civilian and other goods and of submitting them to the Supply Priorities and Allocations Board for approval or modification. It was also provided that:

7. There shall be within the Office of Production Management a Division of Civilian Supply to be in charge of a Director appointed by the Office of Production Management with the approval of the President. The Division of Civilian Supply shall represent civilian interests relating to the supply and priority activities of the Office of Production Manage-

[10] *Supra* note 3.
[11] *Supra* note 7.
[12] *Ibid.*
[13] §2(a).
[14] *Ibid.*
[15] 6 FED. REG. 4483 (1941).

ment. It shall formulate plans and programs providing for the equitable distribution among competing civilian demands of the materials, articles, power, fuel, and other commodities made available by the Supply Priorities and Allocations Board for civilian use. Such plans and programs shall be submitted through the Office of Production Management to the Supply Priorities and Allocations Board for approval or modification.

The power thus given to OPM—and through OPM, to the Division of Civilian Supply—was a broad one. The Vinson Act expressly referred to "a shortage in the supply of any material . . . for private account," an expression clearly intended to apply to civilian needs. However, if there was any doubt about the meaning of this statutory language, its underlying legislative history dispelled that doubt. In the Senate Report recommending passage of the Bill, the following statement appears in a "summary of purposes of the Bill":

[The Bill is designed] . . . to promote control of the distribution of those products and materials in which shortages appear by reason of the impact of the defense program and to promote the allocation of such production and materials to defense and to the most important civilian needs in preference to less important uses.[16]

Similar statements were made during the course of hearings on the Bill. For example, Mr. Stettinius, then Director of Priorities, made the following statement before the Senate Committee on Military Affairs:[17]

Where such shortages occur, inevitably the balance available for civilian consumption is insufficient to cover all civilian needs. It therefore becomes necessary, when such shortages occur, to direct the distribution of the balance, after fulfillment of defense needs, in order that the supply left may be used for the more important civilian needs rather than to allow it to be consumed in non-essential uses.

In the House of Representatives, statements similar to those made in the Senate appear. Thus, Representative Vinson, sponsor of the Bill, said:[18]

It is very important, therefore, that authority exist for allocating from available supplies, first, to fill vital defense requirements, and secondly, to civilian needs in the order of their importance.

It was thus made clear that the powers given to the President by the Vinson Act were to be used to allocate materials to civilian needs in the order of their importance. In addition to this, the legislative history of the Act shows plainly that the power to allocate may be exercised both in cases of actual shortage and in cases of anticipated priorities or allocations program. For power to deal with shortages only after they occur would be tantamount to locking the barn door only after the horse is stolen. That the Vinson Act gave the President power to foresee the possibility of the horse being stolen was pointed out by Representative Vinson, who, in reporting the Bill to the House, said:[19]

[16] SEN. REP. No. 309, 77th Cong., 1st Sess. (1941) 6.
[17] *Hearings before Sen. Committee on Military Affairs on H. R. 4534*, 77th Cong., 1st Sess. (1941) 33.
[18] 87 CONG. REC. 3801 (May 8, 1941).
[19] 87 CONG. REC. 3801 (May 8, 1941).

. . . a priorities system . . . must contain safeguards against acute shortages of essential materials arising. An effective safeguard will provide for taking steps to conserve the supply of such materials before the shortages become acute.

Under the broadest interpretation of Section 2(a) the best that can be done now is to exercise . . . control over . . . materials . . . in which acute shortages have occurred. That is not sufficient.

The same view was advanced clearly by Mr. Geoffrey Smith, Counsel, Priorities Division, Office of Production Management, in the hearings on the Bill, in which he said:[20]

This will give the President, or whatever agency he assigns the power to, the right to foresee a shortage before it becomes acute and take the necessary steps to prevent it from becoming acute. That is a very important authority that we badly need at the moment, because as the impact of this program hits us, there are in various fields more and more areas where you can see on the horizon a shortage that has not become acute as yet.

This thought appears also on page 5 of the Senate Report on the Bill, where it is stated that the Bill gives "confirmation of the right to deal with acute shortages, and further to conserve the supply to prevent acute shortages." This power to anticipate shortages as well as to deal with existing shortages is very necessary to effective administration of priorities and allocations under the Act. Since the power given is so complete, there is no need for a meticulous distinction between orders brought about by existing shortages and orders brought about by anticipated shortages. In the nature of things, such a distinction would be unreal, and the language of the Act fortunately makes it unnecessary to draw such a distinction.

The basic statutory power found in the Vinson Act was expressly delegated by the President to SPAB by the Executive Order of August 28, 1941. Recently, by Executive Order dated January 16, 1942,[21] the President created the War Production Board. To the Chairman of this Board, the President delegated, among other things, the power to:

Perform the functions and exercise the powers vested in the Supply Priorities and Allocations Board by Executive Order No. 8875 of August 28, 1941.

Thus, these basic priorities and allocations powers now reside in WPB.

Until recently, the Vinson Act was applicable to shortages in the "supply of any material" and provided for the allocation of "such material." The Executive Order of August 28, 1941, containing the basic delegation of power refers to distribution among competing civilian demands of the "materials, articles, power, fuel, and other commodities." The question has arisen whether the term "material" used in the Vinson Act was meant to be as broad as the President's order of delegation asserts. Unquestionably the Vinson Act was intended by Congress to be comprehensive legislation on priorities and allocations to assure an orderly and effective defense production. The statute was written in broad terms. And it contained broad delegation of power

[20] *Hearings before the House Committee on Naval Affairs on H. R. 4534*, 77th Cong., 1st Sess. (April 28, 1941) 1000.

[21] 7 FED. REG. 329 (1942).

to the President. Under these circumstances, it would seem that the term "material" must have been used in its broadest sense. The governmental agencies have proceeded on that basis. Recently an amendment to the Priorities and Vinson Acts, which would clarify this problem was adopted by Congress in the Second War Powers Act.[22] The amendment is applicable to shortages in the supply of "any material *or of any facilities*" for defense or private account and provides for allocation of such "material *or facilities*." The addition of the term "facilities" removes any doubt concerning the breadth of the priority and allocation power.

V

Decisions regarding allocation, when made, have been carried out by three broad types of order. Priority or P orders are granted to war or essential civilian industries to insure that all their requirements for materials are satisfied first. In effect, then, P orders determine who shall go to the head of the line waiting for scarce raw materials. Limitation or L orders, on the other hand, determine who shall be forced out of line, in part at least. They have been applied mostly to end-products in the form in which they are bought by the ultimate consumer, and have the effect of reducing the demand for all the materials embodied in the restricted end-products. Finally, there are conservation or M orders. These apply to a single scarce raw material, limit certain of its uses, and thus provide a mechanism for allocating the available supply.

Statutory authority for these various types of orders may be found in the Priorities Act which provides that "priority" may be "assigned to deliveries . . . under contracts or orders . . ." and that the President may "allocate . . . material." These various types of orders are designed to reinforce the priorities and allocation system authorized by Congress. Although there is no express statutory direction to use these types of orders, it would seem that they can be supported as appropriate methods to effectuate the statutory priority and allocation powers.

These various types of orders should be distinguished from the preference rating which they sometimes contain.[23] A preference rating is often attained as a result of an individual application in connection with a given transaction, on forms known as PD-1's. Most P orders, however, confer a blanket preference rating on the purchases of all sorts of materials by an industry whose products are considered to be especially important. For example, Order P-56 applying to mine operators, granted such producers an A-1-A rating on the purchase of material needed to repair a mine in the event of actual shutdown, a rating of A-1-C on the purchase of materials necessary to prevent an imminent breakdown, and an A-3 rating on general items of mining equipment. This latter can be applied, by all qualified mine operators, to the purchase of a wide variety of materials needed for mining operations.

Although sometimes they have been accompanied by a P order giving a preference rating to enable the industry to obtain the materials necessary to undertake the per-

[22] Pub. L. No. 507, 77th Cong., 2d Sess., approved March 27, 1942.

[23] Preference ratings run as follows: AA, A-1-A to A-1-J, A-2 to A-10, B-1 to B-8. The "B" ratings are generally used to distribute small amounts of scarce materials available for civilian industrial uses.

mitted production, in most cases L orders are not accompanied by any preference ratings. Instead they serve to reduce the demand for scarce materials by limiting the production of, and therefore the use of such materials by, industries whose products seem relatively unessential. For example, L-21 curtailed the production of automatic phonographs and weighing, amusement, and gaming machines. Production of the first three was cut 25% of the base period production for the year ending June 30, 1941, in December, 50% in January, and 75% thereafter, while gaming machines were cut 50% in December, 75% in January and prohibited thereafter. The effect of these limitations was to reduce the demand for and thereby conserve the supply of such scarce materials as copper, aluminum, bakelite, as well as steel.

M orders apply to a particular material and either allocate it completely or control certain of its uses. For example, M-21-d prohibits the use of corrosion and heat resistant chrome steel in the fulfillment of orders bearing a preference rating of less than A-10 (except in the case of articles already fully fabricated). The effect of this order was to confine the use of chrome steel to uses which had received a preference rating and prevent chrome steel from going into a wider variety of products, especially consumer electrical heating appliances, which were felt to be comparatively unessential uses of this highly critical material.

At the start of the defense program P orders were used to insure that companies making defense products should be served first. As we started with a certain amount of unused capacity, it was at first possible to divert materials to defense production without cutting down on other uses. In a short time, however, it became clear that certain materials, especially aluminum, were going to become extremely scarce. In the case of such materials, the preference rating system did not work very well. An industry which, for example, was rated A-2, was often allowed under the preference rating system to obtain all of a scarce material it wanted before an industry rated A-3 was allowed to obtain any. In such cases resort was had to M orders. To begin with these orders were often able to balance supply and demand by eliminating or restricting relatively unessential uses of a scarce material. But as the shortage became acute it became increasingly necessary to allocate all of a given material—in other words, OPM had to determine from month to month each of the specific uses to which the material could be put and the amount available for each use. Still later, as scarcity became widespread, L orders were used to reduce the demand for all the materials going into relatively less essential civilian products.

Until quite recently, therefore, the Division of Civilian Supply has been mainly concerned with freeing materials for the defense effort by aiding in the issuance of orders designed to restrict the production of relatively less essential civilian products. Among the outstanding consumer durable goods which have been restricted are passenger cars, mechanical and ice refrigerators, and cooking and heating stoves. That the civilian population can get along without them in time of emergency and that such existing goods can be made to last longer was demonstrated during the depression and undoubtedly will be demonstrated again during the present war. A

somewhat detailed examination of the L orders which were issued to curtail the production of these goods will indicate the general methods which were used.

The first limitation order on automobiles was issued on September 13, 1941.[24] The three largest producers were, during the four months from August through November, restricted to 60% of their output during a three-year base period running from August 1, 1938, to July 30, 1941. Smaller producers were curtailed to 85% of their average production during the same period. Production of cars for certain government purchasers and for export to countries covered by Lend-Lease arrangements was, by a later interpretation,[25] excluded from the quotas. Production was left approximately unchanged during December, but toward the end of the month was cut a further 25%.[26] At this time it was proposed to cut January production to 50% of the original December quota. Later, however, production at 100% of the December quota was permitted,[27] but at the same time complete cessation of production after January (except for a 10-day grace period until February 10) was ordered. On January 1 a general limitation on the sale, delivery or transfer of passenger cars was put into effect to conserve the existing stock, and also the cars produced during January, for essential uses.[28]

Domestic mechanical refrigerators were first limited on September 30, 1941.[29] The limit imposed varied with the relative size of the manufacturer. Those manufacturers whose monthly average factory sales for the base year (the year ending June 30, 1941) exceeded 16,000 units were limited during each month from August through December, to 55% of their average monthly production during the base period; while manufacturers producing between 5,000 and 16,000 units were allowed a monthly average of 71% of their monthly production during the base period. These quotas were reduced further for January and February of 1942 to monthly averages of 48%, 60% and 70% of monthly production during the base period.[30]

Manufacturers of domestic ice refrigerators were also limited, but in a different manner. During the period from September 1, 1941, through November 30, 1941, the use of steel in the production of ice refrigerators was limited to a monthly average of 65% of the monthly average use during the year ending June 30, 1941.[31] This type of order is aimed at input of raw materials into the industrial plant rather than output of end-products made from the material in the plant. Control was placed on steel used rather than units produced because manufacturers had wood-working equipment and so could use wood instead of steel in the making of refrigerator boxes.

Another order using input control restricted the quantity of iron and steel going into domestic cooking appliances. Here again the degree of curtailment depended on the relative size of the producers. Manufacturers whose factory sales during the base period were between $1,000,000 and $3,000,000 were cut to 69%, and those whose

[24] 6 FED. REG. 4735 (1941).
[25] *Id.* 6683.
[26] *Id.* 6738.
[27] 7 FED. REG. 473, 515 (1942).
[28] *Id.* 116.
[29] 6 FED. REG. 5008 (1941).
[30] *Id.* 6256.
[31] *Id.* 5534.

sales were less than $1,000,000 were cut each month to 70% of average monthly production during the base period.[32]

In all, by the first of this year, 20 L orders had been issued, ranging all the way from restrictions on the use of electric power in the southeast and the consumption of waste paper by paperboard plants in the east to restrictions on the production of vacuum cleaners, vending machines, and farm equipment. In two thirds of the orders restrictions were placed on the output of finished products, while input of raw materials was controlled in the remainder. In a number of cases, however, where main reliance was placed on output control, input control was also used to restrict the production of replacement parts, body trim, and the like. Of course, control of the output of finished products indirectly tends to control the input of raw materials. With the exception of the passenger car industry, where definite quotas for each company were provided, production was restricted to some percentage of a given base period (although minimum absolute quotas were sometimes added to prevent, where different cuts were provided for different size firms, the top of one class from receiving a larger allowance than the bottom of the preceding class). In most cases, production for defense purposes was included in the limitation, because the items covered were usually ones in which defense production was not important. In a few cases where such production was important, however, it was excluded from the limitation to enable the Government to buy on favorable terms. Finally, in about half the orders, restriction was uniformly applied irrespective of the size of the firm; but in the other half the output of large companies was curtailed more than that of smaller firms,[33] on the theory that large companies could more easily obtain defense contracts, had the engineering ability to convert to defense work, and possessed the financial resources to make the change. In some cases, as many as four size classes of firms were distinguished, with different cuts applied to each of the classes.

VI

These various types of orders have been developed to effectuate policies designed to meet the priority and allocation problems of the defense and war programs. The earliest priority and allocation problems that presented themselves for determination involved few difficulties. The first actions under the priority powers were merely determinations to give priorities on delivery to accepted orders of the nation's armed services over other orders. Among the military orders themselves, there was at first practically no problem of priority. Meanwhile, the Army and Navy Munitions Board provided machinery for determining priorities among military orders. This Board began to meet the growing priority problems created by increased military orders by rating the relative urgency of articles of war. It was intended that the contracting

[32] *Id.* 6425.

[33] Many allocations of materials involve distribution of different quotas to different civilian users. The question of discriminatory distribution may therefore arise. It would seem, however, that if expert administrators have concluded in good faith that the quota distribution is reasonable, the allocation would be upheld. See, *e.g.*, Railroad Commission of Texas v. Rowan and Nichols Oil Co., 310 U. S. 573 (1940); Terminal Taxicab Co. v. Public Utilities Commission of the District of Columbia, 241 U. S. 252 (1916).

officers of the armed services could automatically apply the priority ratings to a "critical list" of materials required for the manufacture of the articles contracted for by the armed services. This "critical list" was determined by the current priorities agency (first the Advisory Commission to the Council of National Defense, then OPM, now WPB) upon recommendation of the Army and Navy Munitions Board. The "critical list" expanded as the defense program grew until it finally aggregated some 300 items.

After this initial priority system was in operation for a time it became apparent that the scope of priority orders, together with the expanded civilian purchasing largely stimulated by the military expenditure, was causing increasing difficulty in fulfilling essential civilian requirements. This was especially so in the case of certain metals such as aluminum and nickel. Efforts to remedy this situation were made by attempting to classify the civilian uses in an order of relative importance corresponding to the order of relative importance among the military uses. Thus was born the system of ratings beginning with A-1 for items of the greatest military urgency and ending with B-8 for items of supposed minimum essential civilian importance. In addition to such attempts at automatic classification there was a constantly growing number of individual applications for preference ratings.

By the beginning of last summer it became apparent that unrestricted civilian demands, coupled with the gradually increasing military requirements, would result in substantial shortages of basic commodities like iron and steel. It was further apparent that no plans likely to come to fruition would overcome this shortage. Accordingly the Civilian Supply Division, then a part of OPACS, considered what action might be appropriate to cope with this new development. It became convinced that the system of preference ratings was an inadequate method of dealing with the problem. For one thing, the generalized rating by which all demands of any one class are preferred to any demands of any class lower in rank is workable only while the effect of the preference is at most delay in delivery of the less preferred articles. However, increasing shortages made it apparent that the time was near when failure to obtain a relatively high preference rating would mean inability to obtain the necessary material altogether. Moreover, under such circumstances all the available supply of certain critical materials would be distributed only under rated orders. This, of course, meant a vast number of ratings. And since ratings were handled largely piecemeal, total perspective was lacking. The administrative difficulties of controlling ratings were thereby heavily increased. In fact, by last summer the accumulation of A-1 ratings had already become so vast that it was necessary to subdivide A-1 into A-1-a to A-1-j, inclusive, in order to assure prompt delivery on urgent military orders. In addition, there was then no requirement that an order, however rated, be accepted by the producer, manufacturer or supplier.[84] Thus the priority

[84] This was subsequently changed in August 1941 by Priorities Regulation No. 1, 6 FED. REG. 4489 (1941), so that acceptance of defense orders became mandatory, subject to certain exceptions.

The Second War Powers Act provides: ". . . the President may require acceptance of and performance under such contracts or orders [generally, Army, Navy, Lend-Lease, and contracts or orders which the

rating was no assurance that the person requiring materials for an essential purpose would succeed in placing his order and thereby obtain the benefit of the rating.

In view of these considerations the Division of Civilian Supply concluded that additional and more direct methods were required. Instead of eliminating or curtailing unessential uses by granting preference ratings for essential uses, it appeared feasible to prohibit directly either the manufacture of an unessential article or the use of critical materials in that article. In other words, direct limitation of production of unessential products was inaugurated. Thus was born the limitation order.

The first application of this approach was in the field of consumers durable goods. The available information at the time indicated a shortage of iron and steel of at least five million tons. After study, it was concluded that this shortage could be dealt with administratively by limitations upon the production of consumer durable goods and nonmilitary construction, both large users of iron and steel and relatively unessential to the civilian economy. Further study of the consumer durable goods field was made, and in July 1941 a tentative program was announced by OPACS for curtailing the production of automobiles, refrigerators and washing machines. Coupled with this announcement was a statement that additional curtailment programs for other consumer durable goods were under consideration. Limitation orders in this field were subsequently put into effect.[85] These limitation orders, of course, had their limitations. They were devised merely to cut off unessential demands. They did not deal directly with meeting essential requirements. As then used, the limitation order was adopted without study of the total factors affecting supply and demand of other materials and products.

The next step in the evolution of defense administration of priorities and allocations came about in the farm equipment field. This was the first substantial effort to determine essential requirements of an important civilian industry and to fix production goals to meet those requirements. The Division of Civilian Supply based the farm equipment program on the production goals for farmers set by the Secretary of Agriculture. These production goals were translated by Civilian Supply into terms of equipment necessary to fulfill the program. In turn, the necessary farm equipment was translated into terms of the raw materials required to produce the equipment. It was originally intended that these required raw materials would be earmarked for farm equipment by appropriate orders. However, this did not take place. Instead, the farm equipment program was fitted into the preference rating and limitation order system. A-3 ratings were given to farm equipment and L orders were adopted to prohibit production of such equipment beyond established quotas. Although this method was a step forward in the administration of priorities and allocations, it too had its shortcomings. For one thing, it failed to give adequate

President shall deem necessary or appropriate to promote the defense of the United States] in preference to other contracts or orders for the purpose of assuring . . . priority." (Statement in brackets supplied.)

[85] Since then, of course, the limitation orders in the consumers durable goods field have increased in number and have become progressively more drastic in curtailment until production of some of these civilian goods has been prohibited entirely.

consideration to the material requirements of other essential civilian products. For another, it did not give sufficient consideration to the supply and demand factors of the affected materials. Finally, the preference rating system gave only limited assurance of obtaining the necessary materials for farm equipment.

These methods, with their short cuts, were inadequate as a total method for allocating scarce materials among competing civilian demands. Therefore, the Division of Civilian Supply has recently developed total programs which consider at one time the supply and all of the demands for a scarce material, and also attempt to consider the relations to the other factors entering into the production and uses of the different products.

Current civilian allocation programs have been developed by and large as follows. The total current supply of the scarce material is estimated. As against the total supply, total requirements are estimated—including demands of the Army and Navy, defense plant and defense housing programs, maritime program, Lend-Lease, other exports, and civilian. The requirements other than civilian are primarily the responsibility of other government agencies like the Army, Navy, Maritime Commission, Lend-Lease Administration, and the Board of Economic Warfare. Yet the Division of Civilian Supply obviously must take these other requirements into consideration in determining civilian allocations. Civilian requirements, of course, include not only the needs of the ultimate consumer but also the demands of those industries which are not engaged in direct military production. Similar supply and requirements studies are made with respect to the other scarce materials so that allocation programs may be coordinated.

The problem of allocation is to determine and satisfy the relatively more essential needs out of the inadequate supply. First things are put first. Direct military needs are generally satisfied first. Yet there are occasions in which the civilian uses are equally essential to prosecution of the war effort. Thus, the use of tungsten in tool steel for war production is as important, if not more important, as its use in armor-piercing shells. The Division of Civilian Supply may therefore ascertain basic minimum civilian requirements which constitute an irreducible minimum claim on the supply of material. When the supply of the material available for civilian use is determined, that portion of the pie is then ready for allocation among competing civilian demands.

The allocation among civilian uses is generally based upon detailed schedules of end-product uses of the material. Extensive information is collected to aid in determining these allocations. Once the necessary information has been assembled, the allocation among competing civilian demands is made. The primary purpose of any civilian allocation program is to distribute the material or products so that more essential, rather than less essential, civilian needs are met first and so that the burden of shortage is minimized.

A list of criteria considered in making allocations among competing civilian demands would be excessively long. Of course, it is impossible to apply precise

formulae in weighing the various criteria used. Allocation is a comparative, not an absolute, process. A few of the relatively simple standards are set forth in the margin below.[36]

VII

1. *The Evolving Procedures for Priorities and Allocation.* Thus far, the substantive considerations which enter into the formulation of priorities and allocation programs have been discussed. We now turn to the procedures whereby these programs are determined.

The statutory basis for allocation of materials is general with respect to the standards to be observed, and is completely silent as to the procedure to be followed in making determinations. It is doubtful that either the absence of more specific standards or the absence of any procedural requirements presents a substantial legal problem. However, the form of the legislation does cast upon the affected government agencies the burden of making appropriate provision for the performance of their duties without guidance or directions from Congress.

The procedures followed during the early development of the defense program involved primarily internal considerations among government officials. From the outset, however, there was extensive informal discussion with members of affected industries and labor groups. As defense activities increased, machinery was devised for obtaining more regularized discussion with representatives of industry and labor. To that end a formal bureau was set up in OPACS for the purpose of establishing lists of representatives of private groups who might be consulted advantageously with respect to problems then before the agency. As the defense program has grown into a war program there has been considerable evolution in the development of procedures. The development cannot be regarded as completed, however, and it is certain that further changes will take place.

As presently organized, the Division of Civilian Supply does not issue orders or regulations. The orders and regulations are issued by the Chairman of the WPB or

[36] 1. Less material is allocated to a product utilizing a large quantity of the material in relation to its functional use than to a product which has greater functional use in relation to unit consumption of the material.

2. More material is allocated to a product which is by nature largely functional than to a product which has a decorative, nonfunctional purpose.

3. Less material is allocated to an industry which can be readily converted to war production than to an industry where curtailment, because of the impossibility of conversion, would entail extensive labor displacement with small opportunity for reabsorption of labor.

4. More material is allocated to a product which is by nature a collective facility serving a large number of people, such as commercial cooking equipment, than to a product used primarily in a single household, such as domestic cooking equipment.

5. Less material is allocated to a product in which the possibility of substitution of less scarce materials is feasible.

6. More material is allocated for replacement purposes to a product which requires a large annual replacement than to a product which is highly durable.

7. The allocation of the material involved is adjusted in consideration of external limiting factors such as shortages of other necessary component materials.

8. More material is allocated to a product which constitutes subsidiary equipment for the production or operation of several end-products than to a product in which the material is consumed for a narrow or highly specialized function.

by his agent, the Director of the Division of Industry Operations. It should be borne in mind, therefore, that the administrative procedures of the Division of Civilian Supply which lead to orders or regulations merely gear into the over-all procedures of the WPB. This is shown by the steps leading to effectuation of a civilian allocation program. When tentative programs have been drawn up by the Division of Civilian Supply, they are discussed with other divisions of WPB as well as other interested government agencies. In the course of working over those plans representative groups of the industries and labor unions affected may be called in through the Division of Industry Operations and the Labor Division for advice and suggestions. When the plans of allocation are formulated they are presented to the Requirements Committee of the WPB. This Committee consists of representatives from the War Department, Navy Department, Office of Lend-Lease Administration, Board of Economic Warfare, Maritime Commission and the Division of Civilian Supply, with a chairman deputized by the Chairman of the War Production Board to determine questions before the Committee. The Committee has the duty of determining and approving programs for the allocation of available supplies of essential and critical raw materials and industrial materials among the various claims represented by the committee members. Its recent formation represents a significant step towards development of over-all programs. If the Requirements Committee approves the allocation program, it is then sent to the Director of Industry Operations. In the Division of Industry Operations the program is put into the form of a proposed order or orders which seek to effectuate the program. After clearance with other interested divisions of WPB, the proposed order is then sent to the Bureau of Priorities. At this point a Clearance Committee has been established to advise the Chief of the Bureau and the Director of the Division of Industry Operations on proposed orders. The Clearance Committee is a representative body with members from the Army and Navy Munitions Board, the Division of Civilian Supply, the Labor Division, the Division of Industry Operations and the Materials Division, and has for chairman the Deputy Chief of the Bureau of Priorities. If adopted, the proposed order is submitted to the Chairman of the WPB or to the Director of the Division of Industry Operations, to whom the Chairman of the WPB has delegated much authority in this regard. If approved by the Chairman of the WPB or his agent, the order is ready to go into effect. The order, when effective, is administered by the Division of Industry Operations or the Division of Materials, depending upon the type of order.

Informal procedure is the warp and woof of administrative practice at WPB. Procedures are not yet entirely set: they are undergoing continual revision as the agency itself organizes to meet production goals. Formal procedure, as it has been developed in courts of law and certain administrative agencies,[87] has not been used

[87] In general, the administrative procedures followed by the War Production Board are not similar to those of regulatory agencies like the Securities and Exchange Commission and others. The administrative procedures followed by the regulatory agencies are outlined broadly in the statutes which created the agencies. There is no statute laying down the bare fundamentals of procedure for the WPB.

at WPB. Formal procedures, consisting of notice, hearings in which testimony under oath is taken subject to the right of cross-examination and is embodied in a formal record to which the agency is limited in reaching its decision, oral argument supplemented by written briefs, and formal findings of fact and opinion, are an outgrowth of the adversary system of our judicial process. Recognizing the adversary nature of many proceedings[38] before them, some administrative agencies have adopted modified judicial procedures. Adversary proceedings, except possibly for suspension order cases, are not common at the WPB. There is therefore less reason for formal processes in operation. Moreover, the sheer volume of decisions alone would make it impossible to gain added protection to the person whose rights are being decided by formalizing proceedings before the WPB. Efficient administration of the war production effort could not survive a procedure which called for formal hearings in cases of controversy. WPB decisions deal with highly volatile situations created by a swiftly changing economy, and delay may mean disaster to the national interest. In addition, the necessity for immediate operation of decisions makes it imperative to act decisively through quick, decisive, flexible procedures.[39] Even in normal times, of course, the informal method of procedure has been used extensively by administrative agencies to determine private rights.[40]

However, there is still a good deal of room for regularizing procedures in the War Production Board without formalizing them to an extent inconsistent with efficient administration. In fact, regularity of procedure should help expedite administration. Irregularity of procedure results in confusion and lack of policy. A good deal of work is being done currently in regularizing procedure, particularly in connection with appeals procedure. It will be helpful in the functional operations of the War Production Board itself as well as in letting outsiders know what procedures they must follow in requesting relief.

A general set of procedural rules and regulations of the WPB might be valuable in this respect.[41] Some attempts in that direction already have been made. Thus, Priorities Regulation No. 1 and subsequent additions attempted to lay down a general framework for operation of the priorities system. However, this type of regulation related primarily to substantive, rather than procedural, matters. Procedural machinery has at times been blocked out in WPB orders themselves, particularly in M

[38] See U. S. v. Morgan, 304 U. S. 1 (1938).

[39] As Judge Learned Hand, then a United States District Court judge, put it in discussing the President's power to seize cables during the last war: "[The President] . . . had to act quickly, certainly, and without the trammels of courts or private interests." Commercial Cable Co. v. Burleson, 255 Fed. 99, 104 (S. D. N. Y. 1919), *rev'd on other grounds*, 250 U. S. 360 (1919).

[40] REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, SEN. DOC. No. 8, 77th Cong., 1st Sess. (1941) 36 *et seq.*

[41] It is noteworthy that the Price Administrator has issued Procedural Regulation No. 1 governing the procedure for the issuance, protest and amendment of maximum price regulations. This regulation was issued under the provision of §§201(d) and 203(a) of the Emergency Price Control Act of 1942. Since the Act itself spells out a broad procedure, the regulation merely fills in the skeleton.

OPA has also promulgated tire rationing regulations, but these regulations were issued under the priorities and allocation powers set forth in the Vinson Act and delegated to it by the WPB under WPB Directive No. 1 and Supplemental Directive No. 1B. Fed. Reg. Doc. 42-1336, filed Feb. 13, 1942.

orders. However, these procedures do not relate to the issuance of orders. Recently, there have been a series of internal administrative orders which further clarify procedures and functions within the WPB. And through the adoption of clearance forms the procedural routes within WPB have been further regularized. However, the adoption of a general set of procedural rules and regulations would help tie these previous efforts together and establish rules of practice for the outsider. The problem is to evolve rules of procedure and practice which are both sufficiently flexible to enable the WPB to execute its functions effectively, and sufficiently regular and uniform to afford persons whose rights and interests are affected a fair opportunity to present their views. When such procedural rules are evolved, they will tend to ensure uniformity of treatment and to diminish the chances of arbitrary action. Although the task might not be easy, the effort in that direction should prove valuable in administering the war effort

2. *The WPB Procedures and Due Process.* The United States Supreme Court has laid down minimum standards for administrative procedures to meet the requirements of due process of law. These standards are not yet clearly defined. And their application to an executive agency like the WPB during war-time is not yet established. As pointed out above, most of the administrative procedures arising out of adversary proceedings are inapplicable to WPB actions; in so far as concepts of due process stem from adversary processes, they would seem inapplicable to actions of the WPB.

Generally speaking, adequate notice, opportunity for a fair hearing, and statement of findings seem to be the basic elements of due process in administrative procedure. The WPB has followed the practice of giving notice and affording an opportunity for hearing to interested groups, so far as possible, in formulating its programs and issuing its orders. Industry and labor advisory committees have been organized to represent persons affected by proposed orders. And appeals procedures have been provided for individual persons who seek relief from operation of orders. Of course, many orders apply to such large and sometimes indefinite numbers of persons that notice and hearing are impracticable.[42] Thus, order M-9-c restricting the use of copper curtailed so many uses of the metal that it would have been impossible to notify and accord a hearing to all persons affected by the order. With respect to findings, the United States Supreme Court in *Panama Refining Co. v. Ryan*[43] held that an executive order prohibiting the interstate shipment of "hot oil" violated the due process clause because it contained no statement of findings whereon it was based. However, the Court expressly excepted from its requirements of findings executive action which appropriately belongs to the executive province and is not subject to judicial review.[44] Mr. Justice Cardozo entered a vigorous dissent to the holding of the majority in the *Panama Refining* case, stating:[45]

[42] *Cf.* Bi-Metallic Investment Co. v. State Board of Equalization, 239 U. S. 441, 445 (1915).
[43] 293 U. S. 388 (1935); *cf.* U. S. v. Baltimore & Ohio R. R., 293 U. S. 454 (1935).
[44] Panama Refining Co. v. Ryan, *supra* note 43, at 431-433.
[45] *Id.* at 448.

If findings are necessary as a preamble to general regulations, the requirement must be looked for elsewhere than in the Constitution of the nation.

The views of Mr. Justice Cardozo perhaps influenced the Court in a subsequent decision in which it limited its requirement of findings.[46] In any event, it is not clear from the opinion in the *Panama Refining* case whether reasoned conclusions or mere formal findings are required by the due process clause. It is customary in the issuance of WPB orders to recite briefly in a preamble a general statement of considerations which have impelled the issuance of the order and to make findings pursuant to the standards set forth in Section 2(a) of the Vinson Act.

The procedure followed by WPB may become clearer by considering each type of order separately. The P order granting priority assistance is generally a blanket order covering a group of persons or an industry at large. After promulgation of the P order, individual persons may qualify for the preferred categories set forth in the order. When priority ratings are conferred by the WPB in an over-all P order, there would not seem to be any acute problem of due process. Just as the Government is free to award its contracts, the Government may confer a preferred status upon industries according to a priority scale. Moreover, any private person who sought to challenge the order would seem to be without standing to do so.[47]

Individual applications for preference ratings for projects or for particular materials or facilities may raise a different question. These applications for priority assistance are passed on individually. The grant of priority assistance is a favor conferred upon the applicant. And if the favor is conferred there can be no question but that the applicant has no standing to raise any question concerning the due process of the priorities procedure. Nor is it likely that the applicant would seek to raise any such question. A more difficult problem arises where the applicant's request is denied. The adjudicative process is informal: formal hearings are not provided. Since the priorities system is a method by which the Government confers favors upon those regarded as relatively essential to success of the war program, it may be argued that denial of such favor does not entitle the applicant to question the procedure whereby decision was reached. On the other hand, it may be argued that the priorities system is more than a favor-conferring technique, that it operates effectively to apportion scarce materials, services and facilities among applicants and may result in economic injury to the applicant. Yet even if the priorities system is, in effect, an allocation system, the resulting economic injury to applicant from rejection of his application does not necessarily entitle him to challenge the decision. The statutory standards for priorities decisions are laid down in the Vinson Act[48] where it is stated that:

> . . . the President may allocate . . . material in such manner and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

[46] Pacific States Box & Basket Co. v. White, 296 U. S. 176 (1935).
[47] *Cf.* Perkins v. Lukens Steel Co., 310 U. S. 113 (1940).
[48] *Supra* note 7, §2(a).

Economic injury to a private applicant is not a separate and independent element of the statutory standard to be taken into consideration in determining whether a priorities application should be granted or denied. As the Supreme Court indicated with respect to the broadcast station licensing powers of the Federal Communications Commission under the Communications Act of 1934, as amended:[49]

> Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public.

However, even if the applicant has standing to challenge the procedure, it would seem that the absence of formal processes in denying such applications is not a denial of due process. Similar informal procedures have been used in administrative agencies for some time in passing upon applications for licenses.[50]

L and M orders are not like the typical orders issued by administrative agencies. These orders apply to an industry at large or to uses of a material. The parties subject to them are indicated but not generally named or specified. In this sense the L and M orders are similar to a general rule or regulation issued by an administrative agency.[51] Formal procedures, in the absence of statutory direction, are not generally used by administrative agencies in promulgating rules or regulations. When the WPB issues an L or M order it would seem to be acting in a legislative capacity rather than in a judicial capacity. And the standards of due process applied to administrative orders would seem wholly inapplicable.

Furthermore, ordinary doctrines of law applicable to administrative rule-making may not apply to rules and regulations promulgated under the President's wartime powers. This view has been taken by the Attorney General's Committee on Administrative Procedure in its report:[52]

> . . . the very emergency character of the situations [wars] makes inapplicable the procedures evolved for dealing with the normal regulations promulgated by administrative agencies in the performance of their duties.

L and M orders generally are issued only after consultation with interested private groups. This is consistent with the practice of many administrative agencies.[53] Some statutes require formal notification, hearing and decision based on the hearing record in the promulgation of substantive rules.[54] In most cases, however, Congress has not seen fit to impose requirements of formal proceedings in the adoption of rules. In the absence of statutory provision, there would seem to be no constitutional question involved in the adoption of rules without formal procedures based on adversary processes.[55] Of course, there is no statute requiring formal procedures by the WPB.

[49] Federal Communications Comm'n v. Sanders Brothers Radio Station, 309 U. S. 470, 475 (1940).

[50] See Black, *Does Due Process of Law Require an Advance Notice and Hearing before a License is Issued under the Agricultural Adjustment Act?* (1935) 2 U. OF CHI. L. REV. 270.

[51] See Fuchs, *Procedure in Administrative Rule-Making* (1938) 52 HARV. L. REV. 259, 264-265.

[52] See REPORT, *supra* note 40, at 101.

[53] *Id.* at 103-105.

[54] *E.g.*, Food, Drug & Cosmetic Act, 52 STAT. 1055 (1938), 21 U. S. C. A. §371; *cf.* Bituminous Coal Act of 1937, 50 STAT. 731, 15 U. S. C. A. §829. See Fuchs, *supra* note 51, at 278-280; REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, *supra* note 40, at 108-111.

[55] In Saxton Coal Mining Co. v. National Bituminous Coal Co., 96 F. (2d) 517 (App. D. C. 1938),

The problem of formal procedures in WPB rule-making involves merely matters of fairness and policy. The present consultative procedure would seem to afford interested groups an adequate opportunity to present their views. Formal hearings would seem to be too cumbersome and might cause a breakdown of effective regulation.[56]

Finally, there is the S order which is a suspension order. The S order is addressed to a named person who has violated another WPB order. It is generally issued only after the following procedure has taken place. The Compliance Section of WPB sends out investigators to examine and report on the true facts concerning the alleged violation. After investigation the Compliance Section determines whether the facts warrant a charge of violation. If the facts are believed to warrant such a charge, the head of the Compliance Section writes a letter to the alleged violator specifically setting forth the charges of violation. In the letter it is stated that if the alleged violator desires opportunity to present a statement of his views he may do so either by letter or in meeting with representatives of the Compliance Section. If he chooses to meet with representatives of the Compliance Section, a full stenographic record is taken of the meeting. After the alleged violator has been given opportunity to present his views, the Compliance Section considers the full facts as then developed and decides whether a violation has occurred which justifies the issuance of a suspension order. If the Compliance Section decides that an S order should be issued it recommends such action to the Director of Industry Operations. The Director of Industry Operations then has full charge of the case and makes the final decision as to whether an S order should be issued against the violator. Under this procedure, the alleged violator is given adequate notice of the charges and is afforded an opportunity to present his views.

3. *WPB Appeals Procedures.* WPB has also worked out appeals procedures to safeguard the interests of those affected by its orders. L and M orders usually have express provisions for appeal. And Priorities Regulation No. 1, applicable to all priorities orders and actions, provides generally for appeals from rules, regulations or orders of the Director of Priorities. The appeal is not to a court of law. Rather, it is an appeal to the WPB. The appeal provision is generally in the nature of an exception or exemption from the order involved. Generally, the appeal provision in L and M orders provides that any person affected by the order who believes that compliance would work "an exceptionable and unreasonable hardship" upon him may apply for relief to the WPB. Some orders provide for appeal not only where the

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a question was raised whether notice, hearing and findings of fact were required before the Bituminous Coal Commission adopted price-fixing orders. The question raised, however, was one of statutory construction and not of constitutional issue.

[56] Where adversary hearings have been held in rule-making, the resulting procedure has been cumbersome. The record and exhibits underlying a bituminous coal price order totaled over 50,000 pages. Wage-order records under the Fair Labor Standards Act have run to 10,000 pages each. It is noteworthy particularly that the bituminous coal price order was issued more than two years after the procedure leading to it was begun. See REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, *supra* note 40, at 110.

applicant believes that an "exceptionable and unreasonable hardship" would be worked upon him but also where compliance "would result in a serious problem of unemployment in the community," or "would disrupt or impair a program of conversion from non-defense work." The procedure is generally for the applicant to address in writing appropriate persons in the WPB setting forth the pertinent facts and the reasons for request for relief. There has been, however, no strict insistence upon formalities for appeal. Informal requests for relief have been treated as full-fledged appeals and acted upon as such. However, practice now in effect calls for the use of appeals forms.

The appeal is usually referred to the administrator of the order involved. The administrator, in turn, may obtain clearances from other divisions of WPB which are interested in the problems raised by the appeal. There are some cases, however, in which clearance is deemed unnecessary and the decision of the administrator governs. Where clearance with other divisions is deemed necessary and is obtained, the appeal is granted and no further appeals procedure is necessary.

Where, however, clearances of other divisions have been sought and not obtained, the appeal is referred to the Deputy Chief of the Bureau of Priorities. The Deputy Chief, in turn, may refer such unresolved appeals to the Curtailment Review Section which considers the issues involved and may hear all interested parties. Investigators may also be sent out to the applicants to gather relevant facts. The Curtailment Review Section thereupon makes recommendations to the Chief or Deputy Chief of the Bureau of Priorities who makes the final decision. There are many cases, however, in which the Chief and Deputy Chief of the Bureau of Priorities have authority to grant appeals in emergency cases without further clearance.

It is noteworthy that Administrative Order No. 5 of the Division of Industry Operations, effective February 23, 1942, provides that:

> Before granting or denying an appeal, a record shall be prepared by the officer granting or denying the same, showing the reasons for the action taken.

Each appeal therefore is considered carefully and a record is made in each instance. Improvements in appeals procedure are now being worked out.

4. *The Role of Industry and Labor Advisory Committees.* Although there are no formalized adversary proceedings, persons affected by WPB orders have had, on the whole, ample opportunity to present their views before an order was adopted. Businessmen and labor leaders are in daily communication with representatives of WPB. Every day there are hundreds of conferences with businessmen in which representatives of WPB attempt to find out the problems and views of industry. This participation by private groups serves a dual function: it enables the employees and officers of WPB to obtain valuable opinions and information and it affords a protection to private interests that their points of view have been presented. However, there is no formal requirement for such participation by private groups.

Recently, a more regularized procedure has been set up within the War Production Board for handling industry committees. The OPM issued Regulation No. 12

on January 14, 1942, reorganizing the Bureau of Industry Advisory Committees, which had its origins in June 1941. The Bureau of Industry Advisory Committees serves as a central point of clearance in connection with the formation and operation of industry advisory committees.

It should be noted that industry advisory committees are not for the purpose of seeking consent or agreement by industry to a government proposal but are to advise and suggest upon specific problems presented to them. When meetings are held for the purpose of considering problems affecting an entire industry or a segment thereof or involving questions upon which the views of several segments of the industry are desirable, it is customary to set up advisory committees. A government presiding officer is named for each committee, and it is his task, subject to approval by the Bureau of Industry Advisory Committees, to select a representative group to constitute the advisory committee.

A system of labor advisory committees has also been functioning in OPM and now in the WPB through the Division of Labor, although its organization is not quite as elaborate as that of the Industry Advisory Committees. Joint meetings in which representatives of both labor and industry are present have been called occasionally with favorable results and should be encouraged, where possible.

The industry committees frequently discuss and advise on problems which, if not done under government auspices, might involve violation of the antitrust laws. Therefore, a procedure has been worked out whereby approval of the Attorney General of the United States has been sought for the creation and operation of these Industry Advisory Committees. The Attorney General, in approving such committees,[57] indicated that he would not approve any specific action taken by the committee but would clear the general character of the contemplated action. The Attorney General also made clear that each industry committee should confine itself to making recommendations to OPM and should not undertake to determine policies for the industry nor compel nor coerce anyone to comply with any request or order made by public authority. Recently, a new arrangement has been worked out whereby it is no longer necessary to obtain the approval of the Attorney General for the formation of each committee.[58] The Attorney General's approval is now sought only when the proposed activity of a committee makes clearance necessary, that is, when the area of antitrust violation seems involved.

5. *The Question of Judicial Review.* Opportunity for judicial review is another component of the problem of due process in administrative procedure. There is no

[57] Attorney General Jackson, in a letter dated April 29, 1941, wrote Mr. John Lord O'Brian, General Counsel of OPM, as follows: "Some of these acts if accomplished by private contract or arrangement within an industry and carried on for private advantage would probably constitute violations of the anti-trust laws. On the other hand, it is obvious that in the present emergency acts performed by industry under the direction of public authority, and designed to promote public interest and not to achieve private ends, do not constitute violations of the anti-trust laws."

For a more extended quotation from this letter, see Hamilton, *Utilization of the Sherman Act and the Price Emergency, infra,* at pp. 154-155. ED.

[58] Exchange of letters between the Attorney General (dated December 22, 1941) and the General Counsel of OPM (dated December 24, 1941).

express provision for court review of WPB orders. Yet courts have granted a right of review from administrative decisions in the absence of express statutory provision therefor.[59] On the other hand, courts have denied judicial review to some cases because the subject-matter involved was believed to be appropriately within the exclusive province of the administrative or executive agency.[60] It may be that the activities of the WPB, so closely tied to the executive's war prerogatives, fall into this category. In many cases, the President's determinations have been held subject to little or no judicial review.[61] Certainly the judgments exercised by the WPB on behalf of the President involve all those matters of public policy which make up the national security and defense—matters hardly fitted to court review.

Thus far, no person has sought to appeal to a court from an adverse WPB order. It is fair to assume that if judicial review of such an order is sought, the United States Circuit Courts of Appeals would be without jurisdiction.[62] It is possible, however, that a federal district court might assume jurisdiction over the case as an independent suit in equity and thereby review the WPB decision. Judicial review might also result from action by the WPB in seeking court enforcement of its orders.[63] In any event, however, it has been made clear by the United States Supreme Court that due process is not infringed by the withholding of review of administrative orders by federal appellate courts.[64]

VIII

There has been no express statutory provision for enforcement of allocation orders as such until the recent enactment of the Second War Powers Act.[65] Still, until the recent statutory sanctions were made available, there were several possible methods of enforcing the orders. A few of the more important methods have been as follows: Section 35(A) of the United States Criminal Code, which provides generally for criminal penalties for wilful false statements made to a federal government agency, has been and may be useful in apprehending priorities violators who have filed knowingly false information in their applications for priorities.[66] Similarly, the gen-

[59] *E.g.*, American School of Magnetic Healing v. McAnnulty, 187 U. S. 94 (1902); Ng Fung Ho v. White, 259 U. S. 276 (1932); Shields v. Idaho Central Ry., 305 U. S. 177 (1938); Utah Fuel Co. v. Bituminous Coal Commission, 306 U. S. 56 (1939).

[60] *E.g.*, Perkins v. Lukens Steel Co., 310 U. S. 113 (1940).

[61] U. S. v. George S. Bush & Co., 310 U. S. 371 (1940); U. S. v. Chemical Foundation, Inc., 272 U. S. 1 (1926); Dakota Central Telephone Co. v. South Dakota, 250 U. S. 163 (1919); Martin v. Mott, 12 Wheat. 19 (U. S. 1827); Commercial Cable Co. v. Burleson, 255 Fed. 99 (S. D. N. Y. 1919), *rev'd on other grounds*, 250 U. S. 360 (1919). But *cf.* U. S. v. Rodiek, 117 F. (2d) 588 (C. C. A. 2d, 1941), *cert. granted*, 62 Sup. Ct. 101 (Oct. 13, 1941), 54 HARV. L. REV. 1248.

[62] American Federation of Labor v. N. L. R. B., 308 U. S. 401 (1940).

[63] See p. 147, *infra*.

[64] American Federation of Labor v. N. L. R. B., 308 U. S. at 412.

[65] Pub. L. No. 507, *supra* note 22. For a general discussion of the enforcement powers, see Note, *American Economic Mobilization* (1942) 55 HARV. L. REV. 466-467.

[66] 48 STAT. 996 (1934), as amended, 52 STAT. 197 (1938), 18 U. S. C. A. §80 (Supp. 1939). The penalties provided for $10,000 fine or 10 years imprisonment, or both.

This method of enforcement was resorted to recently in the U. S. District Court for the Southern District of Indiana. An indictment was brought under §§35(A) and 37 of the U. S. Criminal Code against an Indiana tire dealer for alleged violation of OPA's tire rationing regulations. The indictment charged that officers of the tire dealer knowingly filed with the State Defense Council a false inventory of

eral provisions of Section 37 of the Criminal Code against conspiracies to commit any offense against the United States possibly may be invoked to prosecute persons who conspire to violate priority or allocation orders.[67] However, to date the most powerful enforcement device has been the administrative technique of suspending all allocation of raw materials to violators of priority or allocation orders or of withdrawing priority assistance from such violators.[68] Moreover, a violator may be placed on the War Department's blacklist, thereby making him ineligible to receive new government contracts until he has recanted. Although the court injunction has not yet been used extensively,[69] it would seem that the Government might invoke the aid of equity jurisdiction to enforce the priority and allocation program that Congress apparently intended to be mandatory and enforceable.[70] Finally, public announcement of violations remains as a possible method of enforcement. Criminal sanctions for wilful violation of any rule, regulation or order issued under Section 2(a) of the Priorities Act, as amended, have been made available to the War Production Board by the recent enactment of the Second War Powers Act.[71] Title III of that Act provides penalties up to $10,000 fine or one year's imprisonment, or both, for wilful performance of any act prohibited, or wilful failure to perform any act required by Section 2(a) of the Priorities Act, as amended, or any rule, regulation, or order issued thereunder. These punitive provisions of the Second War Powers Act should help make the priority and allocation programs fully effective in the prosecution of the war effort.

In this connection, it might be added that the problem has arisen whether persons who obey the priority and allocation orders and thereby default on other private contracts, render themselves liable on these contracts. The Vinson Act of May 31,

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tires and tubes in stock and knowingly concealed and covered up their alleged evasion of the rationing regulations by destroying inventory records, storing new tires and tubes belonging to the company in their homes, making surreptitious deliveries of new tires and tubes from these stores, and making false invoices describing sales of new tires and tubes as sales of used tires and tubes. U. S. v. LaSalle Motor Sales Corp., OPA Release No. PM 2498, Feb. 15, 1942.

[67] REV. STAT. §5440 (1875), as amended, 18 U. S. C. §88. The penalties provided are $10,000 fine or 2 years imprisonment, or both.

[68] See, *e.g.*, WPB Suspension Order Nos. S-8, S-9, S-12, Feb. 10, 1924. 7 FED. REG. 945, 946 (1941).

[69] In the first action of its kind yet taken, an injunction was sought against the Chicago Alloy Products Company from a U. S. District Court in Chicago to restrain it from interfering with agents of the WPB in enforcing a WPB order directing the company to afford access to its premises for inspection of its inventories, books and records. The court issued a permanent injunction requiring the company to permit audit and inspection by government agents and to refrain from disposing of its stock of metals until the audit had been made. The company was also perpetually enjoined from violating any regulations or orders issued by the WPB. WPB Release No. 218, Feb. 13, 1942; WPB Release No. 468, March 7, 1942.

Recently the Price Administrator applied to a U. S. District Court in Norfolk, Virginia, requesting an injunction against the transfer of tires and tubes contrary to rationing regulations issued by OPA. The defendants challenged the validity of the rationing regulations. The court upheld their validity and issued a permanent injunction restraining delivery of the tires and tubes without OPA authorization. Henderson v. Smith-Douglass Company, Inc., *et al.*, OPA Release No. PM 2498, Feb. 15, 1942; OPA Release No. PM 2640, March 6, 1942. Since OPA rationing power is delegated to it by the WPB, its authority would seem to be bottomed on the same structure as that which sustains the priority and allocation orders of WPB.

[70] See H. R. REP. No. 460, 77th Cong., 1st Sess. (1941) 2-5.

[71] Pub. L. No. 507, *supra* note 22.

1941 provided immunity for such defaults. Recently, the Second War Powers Act has broadened this immunity so that it now reads as follows:

> No person shall be held liable for damages or penalties for any default under any contract or order which shall result directly or indirectly from compliance with this subsection (a) [Priorities Act, §2(a), as amended] or any rule, regulation, or order issued thereunder, notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid.

When Congress gave the President power to allocate materials where shortages appeared, it necessarily must have contemplated that some private contract orders would be displaced. Otherwise, the priority and allocation system would be meaningless. Obviously, Congress did not intend to render those persons liable for default on private contracts for doing their part in the interest of national defense.[72] Still there seems to be some doubt whether this statutory provision is applicable to all situations.[73] Yet it is to be hoped that the immunity from civil liability for breach of private contract afforded by the Vinson and Second War Powers Acts will not be interpreted narrowly by the courts in the light of technical doctrines of impossibility, illegality, and frustration of performance. The "no-damage" provision of these Acts was intended to facilitate participation by persons in war production and should be interpreted in that light.

IX

The allocation program is rapidly becoming more comprehensive as the country gears itself for full-time war. When we first embarked upon an armament program, the problems were different. At the start, when the program was small and especially when there were unemployed resources, it was enough that the military procurement agency established to procure necessary military equipment was given the power: (1) to require the acceptance of orders which it placed; and (2) to insure that such orders were given priority as to time of fulfilment. It is logical, therefore, that the first orders which came into prominence were P orders or Priority Orders, giving preference to military production. As our armament program developed, however, shortages became increasingly acute; hence it was not enough to give military production priority as to time but it became necessary to control the amount going into various uses by means of L orders. As shortages first became acute among raw materials, especially metals, allocation of the amounts available between different uses was first undertaken, by means of M orders, for such materials.

The final stage, which we have not yet fully reached, is one in which shortages are no longer confined to certain scarce materials but apply to materials in general, including power, fuel, transportation and other productive and service facilities, and manpower. When this final stage is reached, allocation of all our productive resources may become necessary.

[72] See Note, *American Economic Mobilization* (1942) 55 HARV. L. REV. 474-476.

[73] See Brown, *The Effect of Conscription of Industry on Contracts for the Sale of Goods* (1942) 90 U. OF PA. L. REV. 533.

Just as the situation in regard to military production has changed with the expansion of such production, so also has the work of the Division of Civilian Supply. During the Fall of 1941, the major concern of the Division was aiding in the curtailment of unessential civilian uses of scarce materials. During last Fall, most of the materials needed for civilian production were available, so that a relatively equitable distribution could be obtained simply by limiting the comparatively unessential uses of materials. But just as it has become increasingly necessary to allocate scarce materials among various military uses, so also has the work of the Division been shifting, as scarcity increases. From cutting off less essential civilian uses of materials the Division is progressing to allocation of the supplies available for civilian use and to insuring the availability of supplies for minimum essential civilian needs. In short, as we shift from a military program taking a small part of our productive effort to one taking the major share, the work of the Division will shift from freeing materials for military requirements by cutting off relatively unessential civilian production to procuring, much as military materials are procured, those civilian supplies which are necessary if the war effort is not to be impeded by inadequacies in the civilian standard of living. In large measure, therefore, the aims of the Division of Civilian Supply are to guard war production against dissipation by excessive civilian production; to measure the essential needs of the civilian population and to stimulate and secure adequate production to meet these needs; and to protect the civilian population against undue impairment of its standard of living.

UTILIZATION OF THE SHERMAN ACT AND THE PRICE EMERGENCY

FOWLER HAMILTON*

1. The Role of the Antitrust Laws in the Present Emergency

The antitrust laws are playing an important role during the present emergency. They constitute the traditional instrumentality for removing restraints on the production and distribution of goods. Their enforcement is a most potent weapon for dealing with the anti-productive practices and the anti-productive outlook of some of those who control large productive facilities and to whom the Government necessarily must appeal in the first instance to produce war supplies.

Just before the present war started, three fourths of all the contracts for war supplies had been let to 56 corporations.[1] A small cluster of powerful corporations dominated the industrial picture. Such concentration of control by employers naturally evoked large labor organizations similarly controlled. The country must turn to this group of corporations and organizations to supply war needs. The relatively small number of people who control these large corporations and organizations are not unpatriotic, but it is naturally difficult for them to desert the traditional goals of restricted production and high prices. As corporate managers they fear the impact of expanded production upon rigged markets when the war is over.

Although the Sherman Act has helped to save this country from the kind of atrophied industrial feudalism that existed in France, the cartel point of view still has many adherents here. The classic analysis of that point of view and its consequences for war production have been described in a well-known passage from *The Economist*:[2]

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The views expressed in this article are those of the writer and not necessarily of the Department of Justice.

[1] In OPM Public Statement, July 26, 1941, it was said: "Fifty-six corporations having defense supply contracts with the War and Navy Departments have contracted for almost three-fourths of the total dollar volume of such contracts, according to a compilation made by the Bureau of Research and Statistics, Office of Production Management. The balance of one-fourth of the total volume of defense supply contracts was divided among several thousand contractors."

[2] 139 THE ECONOMIST, June 15, 1940, p. 1033.

But there is another set of ideas, just as false and as enervating, which has not been abandoned, partly because the proofs of its failure, though decisive, are not publicly apparent. This is the set of ideas that has been the dominant economic philosophy of the Conservative Party in the past nine years, the set of notions that sees its ideal of an economic system in an orderly organization of industries, each ruled feudally from above by the business firms already established in it, linked in associations and confederations and, at the top, meeting on terms of sovereign equality such other Estates of the Realm as the Bank of England and the Government. Each British industry, faithful to the prescription, has spent the decade in delimiting its fief, in organizing its baronial courts, in securing and entrenching its holdings and in administering the legal powers of self-government conferred on it by a tolerant State. This is the order of ideas that has transformed the trade association from a body of doubtful legality, a conspiracy in restraint of trade, into a favoured instrumentality of the State. . . . It is the order of ideas . . . that turned "high profits and low turnover" into the dominant slogan of British business; that raised the level of British costs to the highest in the world. It is a set of ideas that is admirable for obtaining security, "orderly development" and remunerative profits for those already established in the industry—at the cost of an irreducible body of general unemployment. It is emphatically not a set of ideas that can be expected to yield the maximum of production, or to give the country wealth in peace and strength in war.

Nevertheless, when the war broke out and it became obvious to all but the purblind that maximum production had become the one object that superseded all others, this anti-productive system was carried to its highest point. The noble army of controllers was recruited from organized industry; the rings, from being tolerated, became endowed with all the power of the State. The result has been what could have been, and was, predicted —not so much an unfair advantage to certain private pockets as a sluggish tempo of advance and a low limit to what was considered possible. British industry, by and large, has, until recent weeks, been making the maximum effort compatible with no disturbance to its customs now or to its profit-making capacity hereafter. There is no accusation of unpatriotism in this; on the contrary, businessmen, placed in an impossible position of divided loyalties and contradictory intentions, have done their best. But the result has been what we see—a startling inadequacy of production. What was formerly prophecy is now fact. . . . Both in tanks and aircraft—to take only the two outstanding cases—the existing rings have failed to produce the goods and, nine months too late, outsiders have had to be brought in.

It is the fundamental axiom of industrial democracy that private groups cannot be allowed to exercise economic powers over others uncurbed by law. This axiom finds particular application when huge defense contracts necessarily delegate to private groups vast economic power. Before this delegation the control of these large concerns over their smaller competitors was already substantial. Augmented by huge war contracts it becomes almost plenary. Acting in concert or even alone, these great corporations in many cases can control or completely eliminate competition in basic industries. If exercised, this power curtails production either by eliminating competitors or by restricting their output. The antitrust laws are still the principal safeguard against the abuse of power which the war contracts necessarily delegate to the great corporations.

Taxes will protect against profiteering, priorities and allocation orders will secure

the most efficient utilization of existing supplies, and price ceilings of the kind provided for in the present statute will protect against profiteering and dislocations in distribution of the commodities to which those ceilings are applied. But none of these measures, without vigorous antitrust law enforcement, will protect the independent producers from the growing power of these great concerns.

In recent months antitrust law enforcement has been adapted to war conditions and war needs. At the outset of the defense effort conspiracies to restrict the production of defense materials and cartel arrangements with German concerns were attacked and broken. More recently emphasis has been placed upon defining the limits for legitimate concerted action made necessary by the war and upon stopping conspiracies and practices which curtail production by restricting competition either in war materials or in such basic necessities as food and clothing.

2. *Investigation of Restraints upon War Production*

Over three years ago the Antitrust Division of the Department of Justice undertook its first investigation into restraints upon production of strategic materials. It found that the production in this country of beryllium, a metal widely used in Germany to make alloys, had been stifled by the abuse of the patent privilege.[3] This led to an enquiry into the whole field of strategic materials. Startling restrictions upon the production of some important war supplies were disclosed, and a general investigation was started. It has produced numerous cases and is still underway. Artificial and collusive restrictions of production in such essential commodities as aluminum,[4] magnesium,[5] beryllium,[6] military optical instruments,[7] tungsten carbide,[8] machine tools,[9] nitrogen,[10] bentonite,[11] pharmaceuticals,[12] drugs,[13] dyes,[14] and synthetic rubber[15] were uncovered.

In many cases German influence was discovered in certain vital industries. The

[3] *Hearings before Temporary National Economic Committee*, Pt. 5, pp. 2011-2158.

[4] U. S. v. Aluminum Co. of America, et al., S. D. N. Y.

[5] U. S. v. Aluminum Co. of America; U. S. v. American Magnesium Co.; U. S. v. Dow Chemical Co., S. D. N. Y., indictment returned, Jan. 30, 1941.

[6] See note 3, *supra*.

[7] U. S. v. Bausch & Lomb Optical Co., S. D. N. Y., March Term, 1940, complaint and consent decree filed September 16, 1940.

[8] U. S. v. General Electric Co., et al., S. D. N. Y., indictment returned, Aug. 30, 1940.

[9] U. S. v. Central Dye Casting & Mfg. Co., N. D. Ill., indictment returned, Jan. 25, 1941; U. S. v. Barber-Colman Company, N. D. Ill., complaint filed, Oct. 7, 1941.

[10] U. S. v. Allied Chemical & Dye Corp., S. D. N. Y., indictment returned, Sept. 1, 1939.

[11] U. S. v. American Colloid Co., S. D. N. Y., indictment returned, Aug. 29, 1940.

[12] U. S. v. Ciba Pharmaceutical Products, Inc., et al., D. N. J., information filed, Dec. 17, 1941; U. S. v. Roche-Organon, Inc., et al., D. N. J., information filed, Dec. 17, 1941; U. S. v. Schering Corporation, et al., D. N. J., information filed, Dec. 17, 1941; U. S. v. Schering Corporation, et al., D. N. J., information filed, Dec. 17, 1941; U. S. v. The Swiss Bank Corporation, D. N. J., complaint and consent decree filed and entered Dec. 17, 1941; U. S. v. Julius Weltzien, et al., D. N. J., information filed Dec. 17, 1941.

[13] U. S. v. Alba Pharmaceutical Co., S. D. N. Y., information filed, Sept. 5, 1941; U. S. v. National Wholesale Druggists' Association, et al., D. N. J., indictment returned, Feb. 6, 1942.

[14] U. S. v. General Aniline & Film Corp., S. D. N. Y., indictment returned, Dec. 19, 1941.

[15] U. S. v. Standard Oil Co. (N. J.) et al., D. N. J., information, complaint, and consent degree filed, March 25, 1942.

pattern of its use left no doubt that it was a weapon of economic warfare against the democracies. American concerns motivated only by commercial considerations, had been drawn in many cases long before the outbreak of the present war into cartel arrangements with German concerns selling competing products in the world market. The American concern simply went into the cartel because it seemed like good business to divide world markets, raise prices and restrict production. Under the typical cartel arrangement the American concern secured a monopoly in the American market, the English concern secured a monopoly in the British Empire market, and the German concern secured a monopoly in Germany and in South America, while varying arrangements were made for dividing remaining world markets.

When the British blockade cut off German shipments to South America the Germans were able to supply their South American agencies from sources in this country. As a consequence the Germans retained for a time effective control over South American markets and secured rich[16] profits from these South American sales. Soon after this pattern of German economic control in this hemisphere was disclosed, it was broken by the freezing of German funds and the blacklisting of Axis agencies in South America by proclamation.[17]

While this investigation of restraint upon production of war supplies has been underway, a general enquiry has been made into price-fixing conspiracies and collusive distribution practices which enhance the price of necessities such as food, meat, drugs and clothing. Forty-six cases have already been instituted in the pending food investigation. These cases relate to alleged combinations to fix prices or otherwise suppress competition in the purchase, distribution or sale of meat, milk, fresh and canned fruits and vegetables, bread, cheese, and other food products.[18]

Antitrust law enforcement is an effective instrument for discovering and dissolving artificial restraints upon the production of goods and is the most effective means for creating competition which alone can overcome the anti-productive attitude of many of those who control the large industrial corporations. It is likewise obvious that in times of national emergency, antitrust law enforcement must be closely geared to the activities of other agencies such as the Office of Price Administration and the War Production Board.

[16] See the information, complaint, and consent decree in the case of U. S. v. Schering Corporation, et al., D. N. J., filed, Dec. 17, 1941.

[17] Proclamation of July 17, 1941, 6 FED. REG. 3555, setting up a blacklist of South American companies and freezing credits.

[18] U. S. v. Evaporated Milk Ass'n, et al. (milk), N. D. Cal., So. Div., indictment returned, June 3, 1941; U. S. v. Produce Exchange of Los Angeles, et al. (butter), S. D. Cal., Cent. Div., indictment returned, Aug. 5, 1941; U. S. v. Seattle Fish Exchange, Inc., et al. (fish), W. D. Wash., No. Div., indictment returned, May 5, 1941; U. S. v. Sheffield Farms Co., Inc., et al. (milk), S. D. N. Y., indictment returned, May 5, 1941; U. S. v. Armour & Co., et al. (hogs), W. D. Okla., indictment returned, Oct. 17, 1941; U. S. v. Atlantic Commission Co., Inc., et al. (potatoes), E. D. N. C., indictment returned, Dec. 8, 1941; U. S. v. Wilson & Co., Inc., et al. (meat), N. D. Ill., E. Div., indictment returned, July 3, 1941; U. S. v. American Meat Institute, et al. (meat), N. D. Ill., E. Div., indictment returned, June 19, 1941; U. S. v. Canners League of California, et al. (canning), N. D. Cal., So. Div., indictment returned, June 3, 1941; U. S. v. Kraft Cheese Co., et al. (cheese), W. D. Wis., indictment returned, July 1, 1941.

3. Procedures for the Coordination of Antitrust Enforcement and the Work of the War Production Agencies[19]

Soon after the defense effort got under way steps were taken to coordinate enforcement of the antitrust laws with action taken by defense agencies to accelerate the production of war material. These measures have two aspects. They provide a means for determining the propriety of collective action required by the emergency and for safeguarding against abuses of power thus created. They also provide for the use of antitrust law enforcement to break illegal practices interfering with the war effort. Since then various procedures have been established to achieve this coordination. But they all rest on the basic policy announced in identical letters which the Attorney General sent on April 29, 1941, to Mr. John Lord O'Brian, General Counsel of the Office of Production Management, and Mr. Leon Henderson, Administrator of the Office of Price Administration and Civilian Supply.[20] In these letters the Attorney General stated:

. . . The important points of this policy are:

Meetings of the industry with the Office of Production Management and the Office of Price Administration and Civilian Supply or their representatives are not illegal. Industrial committees may be formed at the request of the Office of Production Management or the Office of Price Administration and Civilian Supply, to work with representatives of such offices on problems involving defense. There will be nothing unlawful in the industry cooperating in the selection of its representatives or in selecting members for committees, or in the activities of such committees provided they are kept within the scope of this letter.

Questions as to whether there is need for such a committee, and if so, how it shall be chosen, and by whom constituted, shall be the sole responsibility of the Office of Production Management or the Office of Price Administration and Civilian Supply. This Department will not participate in these decisions beyond the suggestion now made that any such committee should be generally representative of the entire industry and satisfactory to the Office of Production Management or the Office of Price Administration and Civilian Supply.

Each industry committee shall confine itself to collecting and analyzing information and making recommendations to the Office of Production Management or the Office of Price Administration and Civilian Supply, and shall not undertake to determine policies for the industry, nor shall it attempt to compel or to coerce any one to comply with any request or order made by a public authority.

All requests for action on the part of any unit of an industry shall be made to such unit by the Office of Production Management or the Office of Price Administration and Civilian Supply and not by the industry committee. That is to say, the function of determining what steps should be taken in the public interest should in each case be exercised by the public authority which may seek the individual or collective advice of the industry itself or by its representatives.

Requests for action within a given field, such as the field of allocation of orders, shall be made only after the general character of the action has been cleared with the Department of Justice. If the general plan is approved, thereafter each request for specific action in carrying out such plan shall be made in writing and shall be approved by the office of

[19] The abolition of the Office of Production Management and the creation of the War Production Board will apparently make no change in the problems under discussion.

[20] Dep't of Justice Release, April 29, 1941.

the General Counsel of the Office of Production Management or the office of the General Counsel of the Office of Price Administration and Civilian Supply, but need not be submitted to the Department of Justice. In the case of any change in the personnel of such offices or if serious practical difficulties arise, this latter arrangement may be revoked upon notice from me.

Acts done in compliance with the specific requests made by the Office of Production Management or the Office of Price Administration and Civilian Supply and approved by their General Counsel in accordance with the procedure described in this letter will not be viewed by the Department of Justice as constituting a violation of the antitrust laws and no prosecutions will be instituted for acts performed in good faith and within the fair intendment of instructions given by the Office of Production Management or the Office of Price Administration and Civilian Supply pursuant to this procedure.

In the case of all plans or procedure, however, the Department reserves complete freedom to institute civil actions to enjoin the continuing of acts or practices found not to be in the public interest and persisted in after notice to desist.

The letter established four important principles governing antitrust law enforcement policy during the emergency: (1) Meetings of businessmen with appropriate Government officials for the purpose merely of discussing action to be taken in connection with war production are not considered a violation of the federal antitrust laws. (2) Government agencies may secure an expression of the views of the Department of Justice regarding action which they may request businessmen to undertake. (3) All programs must be formulated, put into effect and policed by the Government agency. (4) The Department of Justice reserves complete freedom of action to enjoin the continuation of any plan found not to be in the public interest and persisted in after notice to desist.

The policy and procedures established in Attorney General Jackson's letter were immediately used by the Office of Production Management and the Office of Price Administration. Other defense agencies soon requested that procedures be established for the application of the basic principle to their work. Correspondence between the Attorney General and the Secretary of the Interior[21] established a procedure under which the Office of Petroleum Coordinator secured the application of this policy to recommendations made by it. This procedure has also been invoked by the Commissioner for Transportation for the National Defense Advisory Counsel,[22] the War Department, the Navy Department, and defense measures undertaken by that division of the Department of Agriculture which has succeeded to the work formerly done by the Commissioner for Agriculture of the National Defense Advisory Commission.

Under this procedure a variety of matters have been handled. Arrangements have

[21] Letter of June 3, 1941, from the Attorney General to the Secretary of the Interior; letter from Secretary Ickes to the Attorney General, dated June 16, 1941; and the reply of the Attorney General, dated June 18, 1941.

[22] Since the transfer of the functions of this office to the Office of Transportation Coordinator created by the Executive Order of Dec. 18, 1941, 6 FED. REG. 6725, the procedure has been applied to this office. Letter of Feb. 8, 1942, from Joseph B. Eastman, Director of Defense Transportation, to the Attorney General, and the reply of the Attorney General to Mr. Eastman, dated Feb. 12, 1942. For the texts of these letters, see (1942) 9 ICC PRACT. J. 564-568.

been made to eliminate the use of cork in certain products; to restrict the use of tin; to reduce the production of automobiles;[23] to reduce the use of metal in certain commodities; to deal with problems in the turbine gear industry; to effect a reduction in the amount of chlorine used in the production of pulp and paper; to effect a simplification of lines; to curtail the production of certain types of sheet and strip steel; to secure cross-licensing of certain patents by members of the aircraft industry; to effect more efficient production of ammonia; to conserve chrome, copper, nickel, steel, raw rubber and mica; to increase the production of titanium oxide pigments; to conserve silk and insure the orderly distribution of available rayon supplies; to increase the production of magnesite brick; to increase the supply of dissolving pulp for the manufacture of explosives; to insure the adequate supplies of waste paper and many other important commodities.

The procedure was somewhat extended, although the basic principle which required a request for action by the Office of Production Management before the program could be approved was retained, in connection with efforts made recently to distribute defense work among a large number of small concerns. By Executive Order of September 4, 1941,[24] a Division of Contract Distribution under the direction of Mr. Floyd B. Odlum was established in the Office of Production Management. The Executive Order contemplates that where individual concerns are too small to secure defense contracts they will pool their productive facilities so that they can secure either a prime contract or a large subcontract. In a letter addressed to the Attorney General by Mr. John Lord O'Brian, General Counsel of the Office of Production Management, on September 30, 1941, Mr. O'Brian pointed out that,

> . . . the procedure outlined in the Attorney General's letter addressed to me under date of April 29, 1941 has worked out efficiently and satisfactorily in the preparation for National Defense. Under the basic principles laid down in that letter, it would seem that no question of violating the anti-trust laws would be presented by conferences held pursuant to the written request of OPM for the purpose of pooling facilities and experience in the fields of production and distribution in order jointly to obtain contracts or subcontracts.

On October 4, 1941, Attorney General Biddle replied that preliminary discussions looking to the formation of defense industry associations, if carried on in good faith, would not be viewed by the Department of Justice as constituting a violation of the antitrust laws if the following conditions were observed:

> (1) The discussions will be carried on pursuant to the written request of the Office of Production Management; (2) when a particular plan for collaboration or cooperation is formulated, the plan will be submitted to the Department of Justice in accordance with the procedure outlined in the letter of the Attorney General addressed to you and dated April 29, 1941; and (3) no action will be taken by those participating in the discussions unless the action is strictly within the limits of a plan which has been approved by the Office of Production Management and submitted to the Department of Justice.

[23] Reduction of the number of automobiles, of course, was made prior to the promulgation of the action stopping further production of automobiles.

[24] 6 FED. REG. 4623 (1941).

The Attorney General also stated:

> For this reason, the Department of Justice must necessarily reserve freedom of action, as it did in the letter of the Attorney General addressed to you and dated April 29, 1941, to institute civil actions to enjoin the continuing of discussions and practices which have been found not to be in the public interest and which have been persisted in after notice to desist.

This procedure for the pooling of facilities has been applied both to nation-wide arrangements in a single industry and, more frequently, to regional associations of small manufacturers. The former case is illustrated by the conversion of manufacturers of household washing and ironing machines to the production of war material, the latter by such local defense associations as the Ypsilanti Manufacturers Consolidation for Defense; San Francisco Defense Works, Inc.; Toledo Defense Production Association; Chicago Defense Association, Inc.; Queens Manufacturers Pool; Central New Jersey Pool; Defense Industries of Montpelier, Ohio; St. Louis Pool of Canvas Production Manufacturers; and the Defense Manufacturing Pool, Inc. of Marin, Sonoma, and Napa Counties, California.

The application of the basic antitrust enforcement policy to situations involving the conversion of major civilian industry to the large-scale production of war material was made clear by an exchange of correspondence between the Attorney General and Mr. John Lord O'Brian, General Counsel of the Office of Production Management, on January 2, 1942. Action required by administrative orders based upon statutory power of course raises no questions under the antitrust laws.

Increasing shortages in materials and amplification of the statutory priority and allocation powers have resulted in defense agencies taking more action by formal order and less by informal arrangements which might involve questions under the antitrust laws. Informal arrangements still possess certain advantages. They enable resourceful administrators to explore the fruitful possibilities of cooperative action before resorting to the rigidities of regulations in fields where formal statutory sanctions do not exist or where administration must be delicately attuned to variety and change. Consequently the War Production Board still finds it convenient in many cases to form advisory committees. It does not clear each of these committees with the Department of Justice, because the Attorney General's letter of April 29, 1941, makes it evident that such committees do not themselves constitute a violation of the federal antitrust laws.

At the present time the War Production Board only clears with the Department of Justice the particular activity which it proposes to request each member of the industry to undertake. All committee meetings which are held under this procedure are called by the War Production Board, whose representative presides at such meetings, and complete minutes of the meeting are retained. No group of industry representatives is authorized to meet without the presence of a representative of the Board except in order to comply with the request to furnish that office with informa-

tion or recommendations, and then only upon the condition that such meetings are confined to the subject matter of the request.

This procedure is now being used by the War Production Board, the Office of Price Administration,[25] the Army Department, the Navy Department, the Defense Plant Corporation, the Office of Petroleum Coordinator, the Office of Solid Fuels Coordination, the Maritime Commission and the Department of Agriculture. It is capable of application to almost any situation where the public interest requires cooperation between businessmen and a war agency. This arrangement has provided an effective means of coordinating antitrust law enforcement with other aspects of the war effort. Through enforcement of the antitrust laws, artificial restrictions on production of war materials and combinations to raise the prices of necessary commodities are being discovered and defeated. By virtue of this procedure war agencies are able to secure all the advantages that may arise from cooperative rather than coercive action.

Since the completion of the foregoing article, arrangements concerning antitrust litigation have been effected in correspondence between the President, on the one hand, the Attorney General, the Secretaries of War and Navy, and the Assistant Attorney General in charge of the Antitrust Division, on the other hand.[26] These arrangements affect neither the operation, the validity, nor the need for the procedures outlined in Part 3 above. The new arrangements simply provide for complete coordination with all-out prosecution of the war.

On March 20, 1942, the Attorney General, the Secretaries of War and Navy, and the Assistant Attorney General in charge of the Antitrust Division in a joint letter to the President of the United States stated in part:

[25] The provisions of the Emergency Price Control Act, Pub. L. No. 421, 77th Cong., 2d Sess. (1942), which give the Price Administrator power to take action which may directly affect Sherman Act enforcement are §§2(a), 5, and 205(d).

Section 2(a) permits the establishment of maximum prices and provides for the creation of committees to advise the Administrator on price policies. The latter provision raises no question of conflict with antitrust law enforcement because committees of this character have already been established under the procedure described above. The former would eliminate the likelihood of price-fixing conspiracies in cases where the demand for the commodity covered by the price ceiling raised prices of all sellers up to the maximum price. Scope for antitrust enforcement aimed at price-fixing combinations would remain where no maximum prices have been established and where concerted action had been used to fix the prices or bring them up to the maximum. Even where the demand for the commodity forces the price for all sellers up to the maximum, ample scope for illegal combinations to suppress competition in production, in distribution or in terms of sale other than price will no doubt remain.

Section 5 authorizes the Administrator in general terms to enter into voluntary agreements for the establishment of maximum prices, and the Attorney General is to be furnished a copy of each such agreement or arrangement. The extent to which this will alter existing practice is problematical. The Administrator has already cleared with the Department of Justice numerous situations in which he has individually agreed with handlers of commodities not to exceed price ceilings. Presumably, this section authorizes somewhat more general agreements, and by virtue of §205(d), the legality of these is confirmed.

Section 205(d) gives immunity from other legal sanctions to persons complying in good faith with the Act or regulations or agreements under it. This provision, in so far as antitrust law enforcement is concerned, simply makes explicit the immunity from antitrust laws which is given to anyone complying with the statutory scheme. The accepted canons of statutory construction would presumably have yielded the same result.

[26] The texts of the letters appear in N. Y. Times, March 29, 1942, §1, p. 33.

Each pending and future Federal court investigation, prosecution or suit under the Anti-Trust Laws will be carefully studied and examined as soon as possible by the Attorney General and the Secretary of War or the Secretary of the Navy, respectively. If the Attorney General and the Secretary of War or the Secretary of the Navy come to the conclusion that the court investigation, prosecution or suit will not seriously interfere with the all-out prosecution of the war the Attorney General will proceed.

If they agree that it will interfere, or if after study and examination they disagree, then, upon receipt of a letter from the Secretary of War or the Secretary of the Navy stating that in his opinion the investigation, suit or prosecution will seriously interfere with the war effort, the Attorney General will abide by that decision and defer his activity in that particular matter, providing, however, that he shall have the right, in such event, to lay all the facts before the President, whose determination, of course, shall be final. In each case the action finally taken will be made public.

The deferment or adjournment of the investigation, suit or prosecution will not, however, mean the exoneration of the individual or corporation, or the discontinuance of the proceeding. As soon as it appears that it will no longer interfere with war production, the Attorney General will proceed.

To make sure that no one escapes by the running of the statute of limitations, we shall request Congress to pass an appropriate extension of the statute.

Under no circumstances will there be any suspension or postponement of prosecution for any actual fraud committed against the government.

On the same day the President replied in part:

I am sure that the Departments of Justice, War and Navy will all cooperate so that the needs of the war will not be hampered by these court investigations, suits or prosecutions, but that at the same time the crisis of war will not be used as a means of avoiding just penalties for any wrongdoing.

In other words, it must be made very clear that the war effort is being impeded. No right-minded person, or any one who is conscious of what is at stake, should use the nation's extremities as an excuse to violate any statute.

Nor, indeed, should there be any deferment or adjournment of any court investigation, prosecution or suit unless, after a study and examination with the Attorney General in each specific case, the Secretary of War or of the Navy is satisfied that the war effort will be jeopardized at this time unless such course is followed.

I note from your memorandum that proper steps will be taken to avoid the running of the statute of limitations in any case; and that under no circumstances will there be any delay in the prosecution of acts involving actual fraud upon the government.

I also heartily approve your intention of making public each determination arrived at by you in accordance with your memorandum. The American people should be informed of each step in their war effort, excepting, of course, any information which may in any way help the enemy in his attempt to destroy us.

BRITISH WARTIME CONTROL OF PRICES

JAMES S. EARLEY* AND WILLIAM S. B. LACY†

Price control has been an integral part of Britain's war economy since hostilities began. The major objectives of the program have been several: the maintenance of morale; the preclusion of wartime economic disorganization; the minimization of post-war economic maladjustments; economy in government expenditure; and the prevention of unjust enrichment or impoverishment of different classes of the community.[1] There have been two broad approaches to the problem: first, the prevention, so far as possible, of any rise in the general British price level; second, the control of specific prices in order, among other things, to prevent "profiteering." Broadly speaking, British authorities have permitted price advances based upon rising import costs or upon "justified" increases in domestic costs. Other price increases have been considered evidence of "profiteering," regarded as "inflationary," and have been combatted by the legislative and administrative regulation outlined below. The British have also attempted to curb the upward pressure upon costs and prices at the source by discouraging (but not prohibiting) the rise of wages, by very heavy taxation, and by an intense drive for saving.

Fiscal policy, propaganda, subsidy, legislation and administrative regulation have all been used as weapons in British price control efforts. It seems appropriate, however, to omit the first two from this discussion, since they raise questions somewhat outside the immediate subject of this symposium. The importance of fiscal policy to price control in Great Britain is indeed sufficient to justify extensive treatment, but

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[1] The official policy, with respect to price stabilization, has perhaps been best stated in the "White Paper" on the subject, Command 6294, issued July, 1941, as follows: "The beginning of the 'vicious spiral' of inflation is found in increased prices; these force a demand for increased wages which is generally followed by a further increase in prices and so on, indefinitely. It has always been found impossible to check inflation when it has gone beyond a certain stage. Consequently it is of the first importance to check it at the beginning.

"By creating insecurity and confusion it would impede our productive effort, give great opportunities to the profiteer and impose hardship on those who were not lucky enough to secure a share in the general advance of money incomes. People in receipt of old-age pensions, insurance benefits, or small fixed incomes would be able to buy less of the necessaries of life. At the same time the money costs of running the war would rise and the Government, unable to raise new taxes sufficiently quickly, would have to issue fresh money, which would further inflame the disease."

such is impossible within the limited space available. Since, moreover, there are many price control agencies operating in the British war economy, it is necessary to confine attention mainly to those of major importance. Finally, detailed description of the techniques of regulation is deliberately sacrificed to permit delineation of the basic economic problems of price regulation which British experience has revealed as inevitable in the prosecution of total warfare, and to describe the manner in which legislative and administrative powers and techniques have been adjusted to cope with them. This type of analysis can best serve the main purpose of studying foreign experience: to make sure that our own authorities are possessed of power to take those steps necessitated by the economic problems of modern total warfare.

I. LEGISLATIVE AUTHORIZATION AND ADMINISTRATIVE ORGANIZATION

Price control in Great Britain has been administered by several agencies, of which three, the Ministry of Supply, the Ministry of Food, and the Board of Trade are the most important. The Ministry of Supply determines the price of industrial raw materials, whether destined for war or for civilian fabrication. The Ministry of Food administers the price of foodstuffs including animal feeds. The Board of Trade controls, pursuant to the Prices of Goods Act of November 16, 1939,[2] and the Goods and Services (Price Control) Act of July 26, 1941,[3] the prices of consumer goods other than foodstuffs, as well as prices charged by certain service industries.

The Ministries of War Transport (ocean and inland transport, and electricity rates), Petroleum, Health (rentals) and Mines (fuel) administer price control of those commodities and services for which each is responsible. The Treasury correlates the price control activities of all the Ministries identified above and is responsible for uniformity in price policy.

The Ministry of Supply

A. Legislative Authority

The Ministry of Supply was created pursuant to the Ministry of Supply Act of July 13, 1939. This Act, together with the Emergency Powers (Defense) Act 1939 and, most importantly, Regulation 55[4] issued pursuant thereto, empowers the Minister of Supply as a "competent authority" under the Act:

(1) To set maximum prices or specific prices.
(2) To prohibit or limit acquisition, disposition, production, use or delivery of a controlled commodity, by general or special direction or by licensing.
(3) To requisition supplies.
(4) To purchase, or contract to purchase, including the power to establish itself as sole purchaser.
(5) To sell commodities or contract for their fabrication.
(6) To examine documents and require returns.
(7) To license imports or exports (with the Board of Trade).
(8) To alter tariffs (with the Board of Trade).

[2] 2-4 GEO. VI, c. 118. [3] 4-5 GEO. VI, c. 31. [4] S. R. & O., 1939, No. 927.

(9) To levy charges (with the Treasury).
(10) To establish and disperse pooling funds.
(11) To pay subsidies.

As the above powers indicate, the Ministry of Supply was created to perform broader functions than the administration of prices. The powers enumerated above, however, have been of the greatest importance in the administration of prices, by indirect as well as by direct control, as will be shown below.

B. Administrative Structure

The Ministry of Supply undertakes to perform the dual function of assembling supplies of industrial raw materials for both military and civilian use, and of directing those supplies destined for military use through the industrial system. Accordingly the Ministry is divided into two major departments designed to perform those functions: the Raw Materials Department and the group of Directors General described below. Responsible to a Secretary to the Minister is the Raw Materials Department, which is divided into sections, each of which is concerned with one or more raw materials.[5] Responsible to another Secretary to the Minister are five Directors General, each in charge of the production of a finished military good.[6] Other Secretaries of the Minister preside over certain service departments,[7] whose functions are to provide necessary information or technical advice to the entire Ministry.

The ultimate authoritative group in the Ministry is the Supply Council, which is composed of the Minister of Supply as chairman, the Secretary in charge of the Raw Materials Section, the Directors General of Munitions Production, Explosives, Tanks and Transports, Ordnance Factories, Finance, and five industrialists and financiers who voluntarily offer part-time assistance and advice.

For each commodity controlled by the Ministry's Raw Material Department,[8] which is directly concerned with the problem of price control, there is an industrial "control" organization, responsible to and deriving all powers from the Minister. The "Control Boards" are composed of representatives of the industry chosen by the Minister and serving usually as temporary civil servants, sometimes without remuneration. The "Controller" and his assistants have often been drawn from that industry which they presently control as public officials, and in many cases are officials of trade associations. Each Control implements those decisions of the Supply Council, which relate to the commodities for which it is responsible. Since policies made by the Supply Council are generally of a broad character, the activities of the Control in many cases determine the nature of government administration of the industry.

[5] The latest available information designates these sections as follows: Iron and Steel, Ferro-alloys, Abrasives, Refractories, Non-ferrous Metals, Chemicals, Sulphuric Acid, Fertilizers, Mercury, Molasses, Alcohol, Pigments, Timber, Cotton, Rubber, Mica, Building Materials, Wool, Leather, Paper, Flax, Hemp, Jute, Silk, Rayon, and Miscellaneous.

[6] Equipment and Stores, Tanks and Transport, Explosives and Chemical Supplies, Munitions, Ordnance.

[7] Typical designations as follows: Finance, Military Advisor, Public Relations, Establishments, Scientific Research.

[8] See note 5, *supra*.

The price of each commodity is determined by the Ministry's Raw Material Department after suitable consultation with the Finance Department, industrial advisory committees, and the Treasury. The Control itself undertakes the enforcement of the price levels set by the Ministry. The principles of price determination will be discussed in a subsequent section.

The Ministry of Food

A. Legislative Authority

The Ministry of Food was created by Order in Council September 6, 1939, issued pursuant to the Ministers of the Crown (Emergency Appointments) Act of 1939.[9] The Ministry of Food took over, upon its creation, the Food (Defense Plans) Department which had been organized in the Board of Trade December, 1936, to anticipate the problems of wartime food administration.

As a "competent authority," the Minister of Food was empowered by Regulation 55 to execute the same powers granted to the Minister of Supply. These powers include the authority to regulate or prohibit the production, treatment, keeping, storage, movement, transport, distribution, disposal, acquisition, use or consumption of foods and animal feed. The Ministry has power to demand complete access to the books, records, and the premises of any company; it may purchase abroad, process foodstuffs itself, and fix prices and margins at any stage of production and distribution. To implement the above powers, the Ministry of Food is authorized to grant or refuse licenses.

B. Administrative Structure

The principal responsibilities of the Ministry of Food are to insure an adequate and reliable supply of essential foodstuffs and to distribute them on an equitable basis at as reasonable prices as possible. The Ministry of Food is divided into three principal divisions, each responsible (directly or through his secretariat) to the Minister. The Supply Division, presided over by the Minister's Commercial Secretary, operates the Commodity Controls, each one of which administers one or more classes of goods or services over which the Ministry has jurisdiction.[10] Each Control is responsible to a Principal Assistant Secretary, a senior civil servant, who, while directly responsible to the Minister's Commercial Secretary has, in fact, direct access to the Minister. The Ministry of Food's Controls are staffed with Civil Servants or persons drawn from the trades but in the actual employ of the Ministry. Each Control has many functions, officially described as follows:[11] "The Staff of the Supply Division may be concerned with the actual purchase and sale of the commodities (in cases where the Ministry itself does the trading), with negotiating with the

[9] S. R. & O., 1939, No. 1119.

[10] A Control exists for each of the following commodities: Animal Feedstuffs, Bacon and Hams, Canned Fish, Canned Fruits and Vegetables, Cereals, Cocoa, Condensed Milk, Dried Fruits, Imported Eggs, Meat and Livestock, Oils and Fats, Potatoes, Sugar, Tea, Imported Fresh Fruit and Vegetables, Cold Storage, Freights, Transport.

[11] SELECT COMMITTEE ON NATIONAL EXPENDITURE, FOURTH REPORT (May 7, 1940), p. 28.

trading interests concerned in the manufacture, processing and wholesale or retail distribution of all controlled commodities, with fixing the margins to be allowed to the trading interests for performing the functions just mentioned and with retail selling prices of the final production."

The Division of Emergency Feeding, Rationing, and Divisional Food Offices is administered by a Deputy Secretary responsible to the Minister's Permanent Secretary. This Division licenses and supervises wholesale and retail traders, administers the Regional Food Offices, operates rationing schemes, and is responsible for all enforcement. The divisional Food Offices are in close administrative relations with the commodity controls described above.

The Planning Division, administered by a Deputy Secretary responsible to the Minister's Permanent Secretary, is responsible for the following assignments: The correlation of economic policy (including price policy), the planning of imports (including the implementation of the Lease-Lend Program), supervision of the Ministry's foreign relations, the correlation of domestic production plans, and the Ministry's relations with all other government departments.

Besides the three divisions identified above, there are in the Ministry four "Service Divisions": the Legal Division, the Finance Division, the Public Relations Division, and the Costings (Margins) Division. The nature of the work of each is indicated by their designations. Each collaborates with the others, providing their specialized knowledge to the prosecution of the vast work of the Ministry.

Of great importance in the actual day-to-day operation of the Ministry are the Standing Committees, usually appointed *ad hoc* to deal with a particular problem. Such committees are composed as follows: The Chairman, a Commercial Secretary; the members, those Principal Assistant Secretaries, in charge of the commodity controls, concerned; a representative of the Freight Division; a representative of the "service" division especially concerned, *e.g.*, legal, costings, rationing or planning. The activities of one of these committees, the Standing Committee on Margins, will be discussed below. The Committees have no executive powers and serve principally as instruments for threshing out difficult problems; they dissolve on the completion of their particular task.

Administrative machinery, by means of which food prices are fixed, consists of the following: The Commodity Control supplies its recommendation as to price fixing, made in the light of its intimate knowledge of the trade, to the Interdepartmental Committee on Food Prices. This latter body makes final recommendations which are implemented by the Control and enforced by the Regional Food Offices. Members of the Interdepartmental Committee on Food Prices represent the Ministry of Food, the Treasury, the Ministry of Agriculture, the Scottish Department of Agriculture, the Ministry of Agriculture of Northern Ireland, the Ministry of Labour, the Ministry of Health, the Prime Minister's department and economic Secretariat of the Cabinet Offices. Attached to the Food Price Committee and comprising essentially the same membership is a sub-Committee called the "Agricultural Prices

Committee," which makes recommendations as to the prices to be paid to producers. The three Agricultural Departments mentioned above have representatives upon this Committee but not upon the Food Price Committee.

Board of Trade

A. Legislative Authority

This article is concerned, of course, with only those activities of the Board of Trade which contribute to price administration. The Board of Trade participates in price control in the following ways:

(1) As the agency charged with the administration of the Prices of Goods Act and its supplement, the Goods and Services (Price Control) Act, the purpose of both of which is to control the prices of non-food consumers' goods and certain services.
(2) As the agency charged with the regulation of civilian industry, by means of its licensing power, the Limitations of Supplies Orders, and the recent plan for the concentration of civilian industry.
(3) As the Ministry primarily responsible for import-export policy.

The Prices of Goods Act of 1939 provides for the regulation of prices in two ways: (1) in accordance with the statutory requirement (Section 1) that a price-regulated good shall not be sold above a price equal to a "basic price" (normally that of August 21, 1939) plus a "permitted increase," described below; (2) by the administrative determination of a specific "permitted price" for price-regulated goods of any description (Section 5). Immediately a good is declared a "price-regulated good" by the Board of Trade, it becomes subject to regulation under the first method described above; this regulation may be superseded, at the discretion of the Board, by the second method. The first method is called the "permitted increase" method, the second the "permitted price" method, of price control.

To overcome inadequacies of the Prices of Goods Act which are described below, the Goods and Services (Price Control) Act was passed, July 26, 1941. This act conferred upon the Board of Trade the following powers:

(1) To fix, for manufacturers, wholesalers, and retailers, either maximum prices or maximum percentage margins of profit.
(2) To fix maximum prices charged for services which directly affect consumer goods prices, such as shoe repairing, furniture storage, cleaning and pressing, etc.
(3) To minimize the activities of unnecessary middlemen.
(4) To establish an official price control organization in the field through the appointment of an adequate inspectorate.

B. Administrative Structure

The administrative organization in the Board of Trade for the execution of the Prices of Goods Act and the Goods and Services (Price Control) Act is very simple. Upon the passage of the Prices of Goods Act, the Board of Trade selected a Central Price Regulation Committee responsible directly to the President of the Board to act as the administrative and policy-making head of its price regulative organization.

This Committee is responsible for the fixing of "permitted prices," "basic prices," and "permitted increases." It determines the scope of regulation and the character of prosecution. The Board constitutes "ultimate authority" and may overrule the Committee.

The Committee is composed of technical experts and representatives of the interests affected by the Act. The original committee was composed as follows: an eminent barrister for chairman; for members, the director of a large department store, an economist, an accountant, a trade union leader, a trade association director, a member of the London County Council, a cooperative leader, and a warehouseman.

A local Price Regulation Committee has been organized in each of the 17 "Wartime Regions" of Britain, each composed of representatives of the interests affected by the Act. These Committees execute the policies made by the Central Committee, hear complaints, initiate investigations and make appropriate representations to the Central Committee.

The above organization, augmented by an inspectorate charged with local enforcement, also administers the new Goods and Services (Price Control) Act.

II. PRICE POLICIES

A. Price Control by the Control of Profit

One of the major aims of the British price control program has been the restriction of profits to a "reasonable" level. Price determination by the Ministries of Supply, Food, Shipping, and Transport has been based upon the maintenance of profits at "normal" levels, although, as will be shown below, regulation is extended well beyond this limited objective. Prices of industrial raw materials have been fixed by the Ministry of Supply at levels calculated to be reasonably remunerative to domestic and overseas producers. Initial prices were commonly set very near those prevailing in the immediate pre-war period and were subsequently revised from time to time (usually upward) on the basis of increases in import or domestic costs. The Ministry of Food has professedly followed a similar policy, and in fixing margins for storage, transport and wholesale and retail distribution, its declared policy has been to preserve their pre-war levels, with adjustment for wartime changes, so as to yield "fair remuneration" to the trades concerned.[12] The only effort to control prices by administrative fiat on the "reasonable profit" principle, without the aid of regulation of supply, demand or distribution, has, however, been by the Prices of Goods Act summarized above.

The objective of this Act was to "freeze" sellers' pre-war net income, although this principle was not expressly stated. Whether a price-regulated good is subject to the statutory requirement of sale at not more than the "basic price" plus the "permitted increase" or to an administrative regulation setting the (maximum) permitted price,[13] in either case, the seller's pre-war net income is to be retained under regulation. The

[12] See SELECT COMMITTEE ON NATIONAL EXPENDITURE, FOURTH REPORT, May 7, 1940, p. 32, and ELEVENTH REPORT, Aug. 8, 1940, p. 12. See also p. 168, *infra*.

[13] These alternatives are described on p. 165, *supra*.

Act specifies that the price of any price-regulated good shall not exceed that charged by the same seller on August 21, 1939 by more than an amount (the "permitted increase") equal to the increased cost of selling that article above the level of cost on the base date (Section 4). The factors to be considered in determining this permitted increase, as well as an administratively determined permitted price, are set forth in a schedule to the Act; the Board of Trade may add others by order. The schedule is comprehensive, including: the cost of goods to the seller; manufacturing, processing and operating expenses of all kinds; selling costs; and "the total volume of the business over which the overhead expenses thereof fall to be spread."[14]

The seller can therefore add all increased direct costs, and if he experiences decreased volume he can legally charge prices sufficiently high to compensate for increased overhead costs per unit. Although the recent Goods and Services (Price Control) Act extends the scope of control of prices of non-food consumer goods, adds control of the prices charged by certain service industries, and provides for more adequate enforcement, the principle of regulation remains the same.

Although the Prices of Goods Act has unquestionably helped prevent profiteering, experience has amply demonstrated that in conditions approaching total war this type of price regulation is inadequate. Throughout its life, there have been persistent complaints of non-enforcement of the Act. Up to the end of August 1940 prosecution had been recommended in only 37 cases, and total fines imposed, including costs, totalled only £189.[15] Even where prices have been held to the level permissible under the Act, it has become clear that they have risen further and more rapidly than official policy could countenance, and that control over supply, demand and distribution is essential. British experience demonstrates admirably what would be expected *a priori* under such circumstances. Even if, by virtue of patriotism or rigid enforcement, prices are kept within limits of "reasonable profitability," actual rises in prices are likely to be great, and the creation of other problems fully as serious as rising prices is inevitable.

In wartime, increased costs are certain to result from several factors: increased import costs (particularly important, of course, in Britain); higher costs of obtaining additional increments of domestic production; decreased efficiency caused by diversion of facilities from customary to wartime activities and attempts to operate industrial units at high levels of intensity; rising wage rates. In addition, many plants in civilian industry will have to work at far below optimum levels of output, so that if price regulation is aimed, as has been the Prices of Goods Act, at preserving the level of profits, prices will have to be raised sharply to permit the covering of overhead on the smaller volume.

As a result of these factors, most of which have operated with especial force in Great Britain, the British have found that prices justified on the profit criterion are in many cases higher than equity, the maintenance of national morale, or the restrain-

[14] See Prices of Goods Act, First Schedule.
[15] Central Price Regulation Committee, Statement to the Press, Sept. 5, 1940, p. 1.

ing of wage advances would dictate. Subsidies at the rate of about $400 million per year have been paid to keep down the price of certain essential foodstuffs; in introducing the Budget for 1941-42, the Chancellor of the Exchequer announced the Government's intention of extending subsidy in the current fiscal year to railway fares, fuel prices, utility charges and the prices of "other articles in common use," in order to keep the cost of living at about its current level (roughly 28% above prewar).[16] If this program is carried through, it will represent the abandonment of the effort to control prices in accordance with the "fair profit" formula, even though the prices paid to suppliers may continue to be fixed by that criterion.

In any case, the fixing of prices with reference to costs and profits, even if it succeeds, will not solve the problems which a price regulation authority faces in modern war. Those who fix prices have the task of providing for the supplies and regulating the consumption of the goods controlled, unless they are willing to set them at the level which the market would in any case hit upon. The price which is "reasonable" in that it gives to industry approximately the necessary, or "pre-emergency normal," profit may be insufficient to insure adequate supply; it is almost certain to be insufficiently high to restrain consumption within the limits of available supply.

As indicated below, the Ministries of Supply and Food have been able to cope with these problems by regulation of supply, distribution and demand through their powers under the emergency legislation described above. Only the Prices of Goods Act administrators, who have possessed no such power, have had to content themselves simply with fixing prices on the "fair profit" basis and permitting either evasion or disequilibria between demand and supply.

B. Price Control Through Supply Controls

To maximize available supply, the Ministries of Food and Supply (in collaboration with the Import-Export Departments of the Board of Trade), have, pursuant to their above-described powers, purchased abroad large supplies of commodities required for the maintenance of a war economy. Large stocks of rubber, wool and cotton have been obtained at favorable prices through trade agreements with the countries of origin, some of these agreements providing for payment through barter, some for payment in cash, and still others through the extension of credit. In respect to other commodities, such as iron and steel, the available supplies were increased not only by maximizing imports but by increasing domestic production. These practices not only gave the Ministries control over possible short-term market behavior, but have also protected the British economy against longer-term price increases accompanying the probable development of world-wide shortages.

In addition to the above means of forestalling price increases, various financial devices have been employed to prevent prices from reflecting fully the influence of the high-cost producers. For example, the iron and steel industry has found it necessary to use larger proportions of high-cost imported materials during the war than

[16] See p. 171, *infra*.

in peacetime. In order that domestic prices of steel should not be unduly influenced by these import costs, a levy has been imposed on the domestic production of steel and the resulting fund has been used to meet losses incurred on the sale of imported steel by the Control. Similar "cost-equalization" schemes have been used in the control of prices for timber and certain foodstuffs.

Outright Treasury subsidy has also been employed to restrain the prices of certain foodstuffs from rising by the full amount of increased import costs. Customs duties have been remitted, food processors have been supplied with raw materials at prices below actual costs to the Government, meats and milk have been sold to retail distributors at prices below those paid their producers by the Government, and in other cases the Ministry of Food sold portions of its stocks in the open markets at less than cost price in order to prevent prices from rising.

In summary, the Ministry of Food is the sole procurer of most of the essential foodstuffs for human and animal consumption, and the Ministry of Supply is in the same position in respect to most of the important industrial raw materials for which it is responsible. By virtue of their control of supply, the Ministries of Food and Supply have been able to exert a degree of control over the British price structure that would otherwise have been impossible.

C. Price Control through Control of Distribution

British experience has proven conclusively that successful control of prices requires regulation of large sections of the processes of distribution. The relative success of the Ministries of Supply and Food may be accredited in large part to the extension of their control of commodities through several stages of distribution, licensing of dealers and specific transactions, and the supervision of distribution by means of priority and rationing.

The importance of such control can perhaps best be illustrated by the difficulties encountered by the Board of Trade in administering the Prices of Goods Act, which provided no control over distributive processes. As a result, there were not only frequent straight violations of the Act, but legal schemes of evasion flourished. "Irregular" middlemen appeared, who purchased goods from wholesalers and even retailers, for the purpose of selling either illegally or at an advanced price based on the "cost" which they had incurred. Goods often passed through a number of these intermediaries, each of whom raised their price. (This practice was encouraged by the limitation of most regulations under the Act to retail prices.) A more "respectable" practice was to hoard supplies of price-controlled goods until their price had perforce to be raised to bring them on the market.[17]

The Goods and Services Act was designed in large part to fill such gaps in the price control structure. In addition to extending the scope of regulation to second-hand goods and certain service industries, and providing for an inspectorate for enforcement, the Board of Trade was empowered by the new Act "to check all

[17] See 141 ECONOMIST, March 15, 1941, p. 335.

profiteers, commission agents, middlemen and speculators alike, as well as to make official control of margins, wholesale, retail and manufacturers', comprehensive enough to be effective." In consonance with these powers the Board was also given the power to fix either maximum prices or maximum percentage margins of profit for all manufacturers, wholesalers and retailers. In this way price control of non-food consumer goods was placed more on a par with the more successful control of foods and industrial materials.

Certain activities of the Ministry of Food also illustrate the baneful results of applying maximum prices to goods over the distribution of which no regulation is exercised. In the case of essential foods, price-fixing was reinforced either by purchase and distribution by the Ministry itself or, at the least, by licensing of importers and retailers. But in the case of other foods, the control of which was initially considered of little importance, maximum prices were imposed only when prices began to get out of control, distribution was left in the hands of unlicensed private wholesalers. As a consequence, the supplies were bought up by speculators and, disappearing from sale at licensed retail shops, were distributed at illegal prices through "black markets."[18]

D. Price Control through Priority, Allocation and Rationing

Experience of all countries indicates that in total war the supplies of goods can never be made sufficient to meet aggregate demands at stable prices. The arms sector of the economy inevitably requires resources which can be released from civilian employment only by sharply rising prices or administrative throttling of expenditure by civilian users.

Through the use of priorities, allocation, and rationing the British authorities, in addition to conserving scarce goods and services for the war effort, have significantly contributed to the stabilization of the price structure. These demand-controlling measures have been employed in connection with three major price control efforts: industrial raw materials, essential foods and feeds, and clothing.[19] The only major price control program which has not been aided by such means has been that for non-food consumer goods. That effective means to restrain civilian demand are essential to successful price stabilization is illustrated by British experience in these fields.

The Ministry of Supply in its control of raw material prices has been able, as a result of its comprehensive powers, virtually to exclude the demands of "non-essential" industrial consumers by establishing priority for defense needs and essential civilian services. Later in the war the priority technique was supplanted in some cases by more elaborate schemes of allocation and licensing, by which total available supplies of raw materials have been allotted for definite periods to preferred indus-

[18] The situation became a public scandal. See 141 ECONOMIST, May 3, 1941, p. 584; *id.* May 10, 1941, p. 618.

[19] Similar controls have been exercised in the case of labor, transport, foreign exchange, etc.

trial users. For example, from April 1940 on, only those uses of steel sanctioned by the official allocation schedules have been permitted, and competitive demand for iron and steel thus practically eliminated.

The Ministry of Food has possessed unlimited power to use what is essentially the same technique—consumer rationing—in its control of food prices. It has exercised this power through the rationing of "essential" foods (meats, butter, margarine, other fats, sugar, tea, milk, eggs, cheese, and marmalades). Since demand could be controlled by the use of such techniques, prices could be fixed and maintained without setting up pressure from unsatisfied buyers.

The inability or failure of certain British price authorities to exercise this control of demand has proven the great importance of such control to successful price stabilization. For example, the Ministry of Food has left unrationed all those foods which were not considered "essential" or the supplies of which were not considered vulnerable. The increased scarcity of some of these, together with the rise of wartime money income and the natural tendency to substitute unrationed foods for those which could be purchased in only very limited quantities, exerted strong upward pressure upon their prices. As a result the uncontrolled demand has led to queues, evasion of price orders, and, in many cases, the disappearance of price-fixed but unrationed foods from the regular markets.

Another example of attempting to control prices without curbing demand is the case of non-food consumer goods under the Prices of Goods Act and the Goods and Services (Price Controls) Act. These acts carry no power to control consumption. The omission was the more serious because the supply of many non-food consumer goods was severely restricted as the progress of the war necessitated giving such products low priority ratings, the conversion of civilian plant and labor to more essential production, and the direct limitation of supply by the Limitations of Supplies Orders.[20]

Consequently the control of non-food consumer goods prices was, by the spring of 1941, an admitted failure. This failure was reflected most clearly by the behavior of clothing prices. By May 1941 the price of clothing in the Ministry of Labour's Cost of Living Index (the only category under the jurisdiction of the Act for which a reliable index number is available) had risen about 75% above its pre-war level, while the total Cost of Living Index had risen by only about 29%, retail food by only 25%, rent by only 1%, and fuel and light by only 25%.[21]

Two remedial measures have recently been imposed. The first is the Goods and Services Act, which improved enforcement and extended control over distribution. The other, which attacks the source of much of the difficulty existing in this phase of

[20] The Limitations of Supplies Orders issued by the Board of Trade began to appear in the late spring of 1940. From June 1, 1940, they cut the supplies of a large number of consumers' goods to 66 2/3% of the base period June 1 to November 30, 1939. They have been extended in scope and severity since that time. Typical quotas are now 25%—33 1/3% of December 1, 1939-May 30, 1940 levels.

[21] Typical wholesale price increases include: Coal 33%, Food 60%. The wholesale price index rose 54% from August 1939 to March 1941.

price control, was the institution of consumer rationing of clothing, boots and shoes, cloth and knitting wool on June 1, 1941. Now that the effective demand for clothing has, presumably, been adjusted to available supplies, the problem of controlling clothing prices should be less difficult. Other non-food consumer goods are, however, still subject only to the control of prices and distribution under the Prices of Goods Act and the Goods and Services Act.

British experience indicates unmistakably that the control of raw materials and food prices alone is insufficient for effective stabilization of the price structure. The problem of controlling prices of non-food consumers' goods cannot be avoided, nor handled lightly, in any "full war effort" in which price stabilization is an objective. The control of prices of essential raw materials may perhaps be relied upon to keep this sector of the price structure stable so long as resources for consumers' goods production are plentiful; but once large segments of resources must be diverted from consumption goods production, as is inevitable in total warfare, no such simple approach to price stabilization will suffice. Under these conditions effective control of the prices of non-food items in the cost of living requires very strong legislation, vigorous enforcement, and—quite probably—the aid of consumer rationing.

INDEX—THE EMERGENCY PRICE CONTROL ACT*

* As used in this index "Adm'r" refers to the Price Administrator and "EPCA," to the Emergency Price Control Act of 1942.